In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES OF AMERICA, BY James C. McReynolds, Attorney General of the United States, plaintiff in error and appellant,

v.

LOUISVILLE & NASHVILLE RAILROAD Company.

No. 499.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, on behalf of the United States, and moves the court to advance this cause for hearing on a day convenient to the court during the present term.

The case involves the power of the Interstate Commerce Commission, under section 20 of the Act to Regulate Commerce, to examine the accounts, records, and memoranda of an interstate carrier.

A resolution of the Senate, adopted November 6, 1913, directed the Interstate Commerce Commis-

sion to investigate and report with reference to the ownership of the Louisville & Nashville Railroad, and its association and connection with certain other railroads. Thereupon, through one of its special agents and examiners, the Commission made a demand upon the officer of the railroad company in charge of the memoranda, accounts, and records for access to and opportunity to examine such of them as were of date on and subsequent to August 28, 1906, which demand was refused. The railroad company for a time had permitted an examiner of the Commission to inspect some of its records, but not all that the Commission claimed the right to inspect under the power given to it by the various acts to regulate commerce. Thereupon a petition for mandamus was filed in the district court by the Attorney General praying that the Louisville & Nashville Railroad Company might be commanded to comply with the provisions of the Act to Regulate Commerce, as amended, and give access to its accounts, records, and memoranda, to its correspondence and copies of correspondence, and to afford opportunity to the Interstate Commerce Commission, its agents and examiners, to examine the same.

The District Court dismissed the petition upon the grounds, among others—

> 1. That except in the clause of the Senate resolution, which refers to an inquiry as to free passes issued, the resolution does not re-

late to interstate commerce as regulated by the act; and

2. That when all contained in the resolution is eliminated, the allegations of the petition are too vague and general to justify the issuance of the writ.

As a result of this decision, the extent of the authority of the Commission in the matter of investigations which it undertakes is rendered uncertain. The case is one of general public importance, and as it is evident that the questions involved will affect the operations of the Interstate Commerce Commission, they should be decided as promptly as possible.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1914.

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THE UNITED STATES OF AMERICA, By James C. McReynolds, Attorney General of the United States, - - - Plaintiff in Error,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Defendant in Error.

No. 499.

Brief for Louisville & Nashville Railroad Company.

HENRY L. STONE,
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Attorneys for Defendant in Error.

November 30 1914.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Defendant in Error.*

No. 499.

Brief for Louisville & Nashville Railroad Company.

STATEMENT.

Prior to the institution of this action, and prior to the demand and refusal which are made the basis of the prayer for a mandamus herein, the Interstate Commerce Commission had caused to be served upon the Louisville & Nashville Railroad Company, defendant in error, an order of the Commission, the terms of which are important, and which we, therefore, here quote in its entirety:

"ORDER.

At a General Session of the Interstate Commerce Commission, held in its office in Washington, D. C., on the 10th day of November, A. D. 1913.

Edgar E. Clark,
Judson C. Clements,
James S. Harlan,
Charles A. Prouty,
Charles C. McChord,
Balthasar H. Meyer,
John H. Marble,
Commissioners.

No. 6319.

In re financial relations, rates and practices of the Louisville & Nashville Railroad Company; Nashville, Chattanooga & St. Louis Railway; and other carriers.

The United States Senate having, by Resolution No. 153, adopted November 6, 1913, directed the Interstate Commerce Commission to investigate, take proof, and report to the Senate as soon as practicable—

First. What amount of stock, bonds and other securities of the Nashville, Chattanooga and Saint Louis Railway is owned or controlled by the Louisville and Nashville Railroad;

Second. What other railroads in the territory served by the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway have been purchased, leased, controlled, or arrangements entered into with for the purpose of controlling by either the Louisville & Nashville Railroad or the Nashville, Chattanooga & Saint Louis Railway;

Third. Whether the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway serve the same territory, in whole or in part, and whether, under separate ownership, they would be competitive to the various points in their territories;

Fourth. Any other fact or facts showing, or tending to show, the further relations between the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway, and any fact or facts showing or tending to show whether these relations restrict competition and maintain fixed rates;

Fifth. The terms of the lease of the Nashville & Decatur Railroad by the Louisville & Nashville Railroad, and what amount, if any, of stock, bonds, and other securities of the Nashville & Decatur Railroad and of the Lewisburg & Northern Railroad are owned by the Louisville & Nashville Railroad or any of its subsidiaries or holding companies;

Sixth. Whether the Nashville & Decatur Railroad, the Lewisburg and Northern Railroad, and the Louisville & Nashville Railroad serve the same territory, in whole or in part, and whether, under separate ownership, these railroads would be competitive between various points in their territories;

Seventh. Any other fact or facts showing or tending to show the further relations between the Louisville & Nashville Railroad, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, and any fact or facts showing or tending to show whether these relations restrict competition and maintain and fix rates;

Eighth. Any fact or facts showing or tending to show (a) the relations between the Louisville & Nashville Railroad, the Nashville, Chattanooga & Saint Louis Railway, the Tennessee Midland Railroad, the Tennessee, Paducah & Alabama Railroad, and any other railroads that have been purchased

or leased by either or both of said railroad companies, and whether such relations restrict competition and maintain and fix rates, and (b) whether the lease of the Western & Atlantic Railroad by the Nashville, Chattanooga & Saint Louis Railway from the State of Georgia and the arrangement made between the Louisville & Nashville and the Nashville, Chattanooga and Saint Louis Railway by which the former uses the tracks of the said Western and Atlantic, restrict competition, restrain trade, and determine and fix rates;

Ninth. Any fact or facts showing or tending to show whether the ownership of the Louisville & Nashville Railroad and the Nashville, Chattanooga & Saint Louis Railway of any railroad terminals or terminal companies, steamboats and steamboat lines upon the Cumberland and Tennessee rivers, and any dock or dockyards at Pensacola, New Orleans, Mobile, or other seaport establishes a monopoly, and restricts competition, and determines and fixes rates;

Tenth. Any fact or facts showing or tending to show whether an agreement or arrangement has been entered into between the Louisville & Nashville and other railroad companies for the purpose of preventing competition from entering into any of the territory served by the Louisville & Nashville Railroad, in consideration of the Louisville & Nashville Railroad agreeing not to enter into certain other territory, or in consideration of any other agreement or arrangement;

Eleventh. What amount of stock, if any, the Atlantic Coast Line Company, or Atlantic Coast Holding Company, owns in the Louisville & Nashville Railroad and in the Atlantic Coast Line, and whether the ownership by such holding company of a majority of stock in both of the aforesaid railroads tend to restrict competition and maintain and fix rates;

Twelfth. What amount, if any, the Louisville & Nashville Railroad, the Nashville, Chattanooga & Saint Louis Railway, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, all or any of them, have subscribed, expended, or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads; and,

Thirteenth. (a) The number of free, annual passes; (b) the number of free-trip passes; (c) the number of every kind of free passes issued by each of said railroads each year since January first, nineteen hundred and eleven, to members of legislative bodies and other public officials or at the request of members of legislative bodies and other public officials; (d) the total mileage traveled upon free passes issued under each of the above classifications; and (e) the amount in money the free passes issued under each of the above-mentioned classifications would equal at the regular rates for such service of each of the above-named railroads;

It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted into and concerning the several matters and things set forth and referred to in the said resolution.

It is further ordered, that this proceeding be set for hearing at such times and places, and that such persons be required to appear and testify or to produce books, documents, and papers as the Commission may hereafter direct; and that the investigation be carried on in the meantime by such other means and methods as may be deemed appropriate.

And it is further ordered, that a copy of this order be served upon each of the following-named railroad companies and upon any other companies

which may hereafter be designated by the Commission:

Nashville, Chattanooga & St. Louis Railway;
Louisville & Nashville Railroad Company;
Nashville & Decatur Railroad Company;
Lewisburg & Northern Railroad;
Tennessee Midland Railroad Company;
Tennessee, Paducah & Alabama Railroad;
Western & Atlantic Railroad; and
Atlantic Line Railroad Company.

By the Commission:
(Signed) GEORGE B. MCGINTY,
Secretary."

(Record, page 33; also page 10.)

It will be observed from the language of the order that it first recites the adoption of the foregoing resolution of the United States Senate, consisting of thirteen paragraphs, which the order quotes in full, and after this quotation the order proceeds as follows:

> "It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted *into and concerning the several matters and things set forth and referred to in the said resolution.*"

After the making of this order and its service upon the defendant in error, the "proceeding of inquiry and investigation" was begun; and in the course of it the examiners of the Commission demanded unlimited access to the offices of defendant, with a right to examine everything in them. This demand being refused, the present action was instituted in the United States District Court for the Western District of Kentucky.

An answer was filed making certain defenses, which will be more specifically referred to hereafter.

Proof was heard orally before the court, which is shown by the bill of exceptions in the record, and the court, after consideration, delivered a written opinion and pursuant thereto overruled the motion for a mandamus and dismissed the petition without prejudice. (For opinion see record 16; United States v. Louisville & Nashville R. R. Co., 212 Fed. 486; and for order and judgment see record 15.)

The district court in its opinion found it unnecessary to consider the question of whether or not the demand made by the Commission would, if enforced, constitute an unreasonable search or seizure of the private papers of defendant, as pleaded in the answer; and found that as to the inquiry called for by the thirteenth paragraph of the Senate resolution, to-wit, as to *free passes*, "full and satisfactory information has been given to the examiners by the defendant." Having disposed of these two matters the court then held that, as granting a writ of mandamus is a matter of sound discretion, there was so much doubt as to the right of the court to compel defendant to exhibit its papers, and such vagueness, indefiniteness and generality in the allegations of the petition, as to what papers plaintiff demanded to examine, the court could not grant the writ. Accordingly the motion for mandamus was overruled and the petition dismissed without prejudice.

It is proper here to say that a similar petition for mandamus was filed (practically contemporaneously with

the one now under consideration) against the Nashville, Chattanooga & St. Louis Railway in the United States District Court at Nashville, Tenn. And upon the hearing of the motion for mandamus in that case, before Judge Sanford, the motion therein was also overruled and the petition dismissed absolutely, Judge Sanford delivering an opinion in which he construed the Act to Regulate Commerce, his construction being that contended for by the railroad company. This opinion is to be published in the Federal Reporter, but at the date of writing this brief has not yet appeared. We, however, quote the same in the appendix to this brief from a manuscript copy furnished to us.

It will probably be easier to understand and appreciate the ground upon which the petition in the case at bar was dismissed by the District Court in Kentucky, when the questions sought to be raised in the case have been, to some extent, considered; and as the Solicitor General has briefed the case elaborately on its merits, we will consider it in that way first and conclude with a reference to the ground upon which the court in the case at bar overruled the motion for mandamus and dismissed the petition.

ARGUMENT.

Of course it is a self-evident proposition that if the examiners for the Interstate Commerce Commission demanded the right to inquire into matters which they were not authorized to inquire into, the railroad company was justified in refusing to submit to the inquiry; and the court was correct in dismissing the petition for mandamus.

And the railroad company does take the position just indicated, to-wit, that the Commission's examiners were seeking to make an inquiry and to examine papers, in course of their inquiry, for which they had no authority.

I.

The Inquiry Directed by the Commission was Limited by its Terms; and the Examiners Had no Right to go Beyond Those Limits.

In the first place, it will be observed from the language of the Commission's order heretofore quoted, that it was not a general unlimited order for an inquiry into the affairs of the Louisville & Nashville Railroad Company, and of the other companies therein named; but it was a limited order, an order expressly limited by its own terms, to certain specific inquiries, each being set forth in a numbered paragraph. It matters not that these inquiries were originally drafted by the Senate, or some member thereof. It is just the same as if the Commission itself, without the instigation of the Senate, had

made an order that those specific things be inquired into. It will be observed, as heretofore mentioned, that after setting forth the special subjects of inquiry embraced in the Senate resolution, the order of the Commission then proceeds:

> "It is ordered, that a proceeding of inquiry and investigation be, and the same is hereby, instituted *into and concerning the several matters and things set forth and referred to in the said resolution.*"

The remaining part of the order is simply as to *procedure*, saying that the proceeding shall be set for hearing at such times and places, and that such persons shall be required to testify, and such books, documents and papers be produced as the Commission may direct; and that the investigation be carried on in the meantime by such other means and methods as may be appropriate. *The subjects of inquiry, however,* are simply those set forth in the Senate resolution, and none other. And we understand the brief of the Solicitor General to admit—although this was not conceded in the court below—that the inquiry and investigation which the Commission was making at the time of the facts involved in this case, were simply those expressed in the Senate resolution, which was copied into the Commission's order. Thus the Solicitor General, at the very beginning of his brief, says:

> "The relief sought by the writ was to compel the defendant in error, Louisville & Nashville Railroad Company, a carrier engaged in interstate commerce, to comply with the provisions of the Act to Regulate Commerce by permitting the Interstate Commerce

Commission, in the exercise of the authority conferred upon it, to have access by its authorized and duly appointed special agents and examiners to all of the accounts, records, and memoranda of the defendant company.

"The Commission was engaged at the time in a 'proceeding of inquiry and investigation' *into certain matters and things set forth in Senate Resolution No. 153*, adopted November 6, 1913, which is as follows." (Quoting the resolution in full.) (Brief, pages 1 and 2.)

Again in the same brief, after quoting in full the resolution, it is said:

"The proceeding of inquiry and investigation was instituted by the Commission on November 10, 1913, and special agents and examiners duly appointed by the Commission were authorized to inspect and examine the accounts, records and memoranda of the defendant in error." (Brief, page 6.)

And the date here given as the date when this proceeding was instituted is the date of the order heretofore quoted.

And again the Solicitor General says:

"The Commission therefore had the power to institute this investigation on its *own* motion and was necessarily the judge as to what information and what representations should be deemed sufficient to cause it to investigate. It had a clear right to give heed to the resolution of the Senate and to comply with it so far as its powers permitted. Having been stirred to action, it was not even bound to restrict its inquiry to the limits fixed by the resolution, *although it appears that it elected to do so.*" (Brief, page 12.)

The importance of the point to which we are here directing the court's attention, arises from the fact that the railroad company, defendant in error, has always insisted since this inquiry began, and now insists, that the matters into which the Commission sought to inquire by the order quoted, were, and are, matters not within the jurisdiction of the Interstate Commerce Commission; that they are matters which would be relevant to an inquiry as to whether or not the act, which is popularly known as the "Sherman Anti-Trust Act," had been violated, but not matters within the scope of the Act to Regulate Commerce; and, therefore, that the Interstate Commerce Commission had, and has, no authority to examine into them, and therefore, of course, no authority to demand the inspection of any papers in order to answer the inquiries which the Commission had no right to make.

II.

The Commission Had no Authority to Make the Examination it Sought to Make.

That the Interstate Commerce Commission, created by the Act to Regulate Commerce, has only jurisdiction to deal with matters controlled by that act (except where specially authorized, as it is by a few acts), seems to be very clear; and has frequently been recognized by the Commission itself.

In one of the earliest cases decided by the Commission, Traders & Travelers Union v. Philadelphia, etc., R. Co., 1 I. C. Rep. 371, the Commission said:

"Nor have we any general power or authority to manage the business of carriers, but only a limited power, expressly defined by the statute, to interfere to prevent wrong and oppression in specified cases. Every ground of our jurisdiction, as defined by the statute, relates directly or indirectly to the transportation of persons and freight by carriers at fair and reasonable rates, and with absolute impartiality as to facilities and accommodations." (Page 374.)

Again in New York Produce Exchange v. Baltimore & Ohio R. Co., 7 I. C. Rep. 612, the Commission, through Commissioner Prouty, used this clear and emphatic language:

"*Our only jurisdiction is to inquire whether the Act to Regulate Commerce has been violated.* That law does not seek to interfere with the business operations of carriers subject to its provisions until those operations contravene the provisions of the act itself. * * * Our only inquiry is, does the situation which the carriers have created violate the Act to Regulate Commerce. That this is the extent of our authority is now settled by the decisions of the United States Supreme Court." (Citing authorities. (Page 658.)

Again in Spring v. Baltimore & Ohio R. Co., 8 I. C. Rep. 443, the Commission said:

"The real difficulty is that the Commission has *no authority to administer the Anti-Trust law,* or even to determine whether that law has been violated. A court of general jurisdiction could do so, but not an administrative body whose power is limited by the law which created it. We are not prepared to admit that the evidence in this case shows a violation of the statute against trusts, but even if

the fact of such violation were clearly established we do not see how that of itself furnishes ground for an order by us against the rates now in force." (Page 456.)

Again in the case of Haines v. Chicago, Rock Island, etc., R. Co., 13 I. C. Rep. 214, the Commission in an opinion by Mr. Commissioner Lane, said:

> "The Interstate Commerce Commission is a creature of statute, and its authority is derived from the Act of Congress creating the Commission and the various amendments thereto. *Its function is to administer the Act to Regulate Commerce; not to enforce conditions found in Federal or other charters.*" (Page 216.)

And this court, and the subordinate Federal courts, have been equally as distinct and emphatic as the Commission itself in limiting its jurisdiction to the enforcement of the Act to Regulate Commerce.

Thus in Texas & Pac. Railway v. Interstate Commerce Commission, 162 U. S. 197, this court said:

> "It is also obvious that if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the Commission." (Page 216.)

Again in the same case, it having been insisted by the Commission that it was its duty "to so construe the Act to Regulate Commerce as to make it practically *co-operate* with what it has assumed to be the *policy of the tariff*

laws," this court expressly repudiated that view, saying:

> "Our reading of the act does not disclose any purpose or intention, on the part of Congress, to *thereby reinforce the provisions of the tariff laws.* These laws differ wholly in their objects from the law to regulate commerce." (Page 221.)

Another case which very sharply draws the line between the Act to Regulate Commerce and the Anti-Trust Act, and as to the duties and powers of the Interstate Commerce Commission with reference to facts within the scope of those two acts, is the late case of United States v. Pacific Arctic Co., 228 U. S. 87. This case was a writ of error to the District Court for Alaska, involving an indictment which contained six counts. The sixth count became immaterial, due to facts not necessary now to be stated. Concerning the other five counts, this court, in its statement of facts by Mr. Justice McKenna, said: "The *first and second count* charge violations of the *Anti-Trust Law.* (Page 88.) * * * The *third* count charged an unlawful and unjust discrimination in the transportation of passengers and freight, *in violation of the Interstate Commerce Act.* (Page 92.) * * * *Count 4 is the same,* as to the facts alleged, as to the *third* count (except as to period of time). * * * *Count 5* brings the discrimination charged down to the finding and presentation of the indictment. (Page 94.)"

In other words, from this statement of fact, it is seen that the first and second counts charged alleged violations of the Anti-Trust Act; while the third, fourth and

fifth counts charged violations of the Interstate Commerce Act. The district court had sustained a demurrer to each of these five counts, on the ground that it was not shown that the Interstate Commerce Commission had acted upon the facts charged in these counts to be violations of law.

This court reversed the judgment, *in so far as it sustained the demurrers to the first and second counts,* charging violations of the Anti-Trust Act; but left the judgment standing—in effect practically *affirming* the same—*in so far as it sustained demurrers to the third, fourth and fifth counts* charging violations of the Act to Regulate Commerce. Thus the court drew sharply and clearly the line between the duties and powers of the Commission concerning alleged violations on the one hand of the Act to Regulate Commerce, and, on the other hand, of the Anti-trust Act, holding that, in the former case, the Commission must act before an indictment could be found based on alleged violations of the Act to Regulate Commerce; but holding, in the latter case, as to alleged violations of the Anti-Trust Act, that no such action of the Commission was necessary, and, as we understand the meaning and effect of the decision, that the Commission had nothing to do with a violation of the Anti-Trust Act.

So in Harriman v. Interstate Commerce Commission, 211 U. S. 407 (a case to which we will hereafter refer again for another point), the court in speaking of the Act to Regulate Commerce, said:

> "Whatever may be the power of Congress, it did not attempt, in the Act of February 4, 1887, C. 104, 24 Stat. 379, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to *enforce the regulations which Congress had imposed.*" (Meaning manifestly, had imposed by the act referred to, and not by other acts, such as the Anti-Trust Act, etc.) (Page 418.)

Furthermore, if we should consider this question as an original one, it would seem perfectly clear that the Interstate Commerce Commission, created by the Act to Regulate Commerce, was never intended to be used as an instrument for enforcing other acts, such as the Anti-Trust Act (except in case of a few acts, mentioned in the Solicitor General's brief, page 14, which it has been given specific authority to administer). Take, for example, the two acts just mentioned, the Anti-Trust Act and the Interstate Commerce Act. Their purposes are widely different, just as the court in Texas & Pac. R'y v. Interstate Commerce Commission, heretofore quoted, said that the Interstate Commerce Act and the tariff laws "differ wholly in their objects." A given statement of facts can constitute a violation of the Anti-Trust Act without violating the Interstate Commerce Act, and *vice versa.* For example, railroads might *by agreement* fix rates for interstate traffic and agree to abide by them for a given length of time. If rates so fixed were in and of themselves *fair and reasonable,* there would be no violation of the Interstate Commerce Act; but such action would clearly be a violation of the Anti-Trust Act. (United States v. Joint Traffic Assn., 171 U. S. 505.) In the case

just cited certain rates had been *agreed upon*, which were "*admitted to be reasonable.*" (171 U. S. 565.) Yet the agreement was held to be a violation of the Anti-Trust law.

It would seem, therefore, to be very clear that the Interstate Commerce Commission has nothing to do with the enforcement of the Sherman Anti-Trust Act, and has no power or jurisdiction to inquire whether or not that act has been violated, and that the jurisdiction and powers of the Interstate Commerce Commission are confined to inquiries and trials concerning matters regulated by the Interstate Commerce Act.

If the foregoing conclusion be correct, the question then arises as to whether or not "the several matters and things set forth and referred to in the said resolution," which is copied into the Commission's order, and concerning which it thereby instituted a "proceeding of inquiry and investigation," are matters regulated by the Interstate Commerce Commission, or, on the other hand, are matters regulated simply by the Anti-Trust Act. And this question would not seem to be very difficult to answer.

Probably no better, or more often quoted, statement of the purpose of the Act to Regulate Commerce has ever been made than that made by Judge Jackson, afterwards Mr. Justice Jackson, in Interstate Commerce Commission v. Baltimore & Ohio R. Co., 43 Fed. Rep. 37, quoted and approved by this court in Cincinnati, N. O. & T. P. Co. v. Interstate Commerce Commission, 162 U. S. 184, wherein the court said:

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of the Interstate Commerce Commission v. Baltimore & Ohio Railroad Co., 43 Fed. Rep. 37, and whose judgment was affirmed by this court, 145 U. S. 263:

" 'Subject to the two leading prohibitions that *their charges shall not be unjust or unreasonable,* and that they shall not *unjustly discriminate,* so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.' " (Page 197.)

On the other hand, the purpose of the Anti-Trust Act has been stated several times by this court in certain leading cases, in some of which the difference in purpose and effect of the Anti-Trust Act and the Interstate Commerce Act have been pointed out.

Thus in Northern Securities Co. v. United States, 193 U. S. 197, the court said the following propositions were deducible from its former decision, to-wit:

"That although the Act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, or whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint of*

trade or commerce among the several States or with foreign nations. * * * That Congress has the power to establish rules by which the interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed *the rule of free competition* among those engaged in such commerce;

"That every combination or conspiracy which would *extinguish competition* between otherwise competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act; * * *

"That to vitiate a combination, such as the Act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a *total suppression* of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it *tends to restrain* interstate or international trade or commerce *or tends to create a monopoly* in such trade or commerce and to deprive the public of the advantages that flow from free competition." (Our italics—page 331.)

In United States v. Freight Association, 166 U. S. 290, which involved an attack upon an *agreement to maintain rates,* this court said:

"The general nature of a contract like the one before us is not mentioned in or provided for by the act" (meaning the Interstate Commerce Act). "The provisions of that act look to the prevention of discrimination, to the furnishing of equal facilities for the interchange of traffic, to the rate of compensation for what is termed the long and short haul, to the attainment of a continuous passage from the point of shipment to the point of destination, at a known and published schedule, and, in the language of counsel for defendants, 'without reference to the location of those points or the lines over which it is

> necessary for the traffic to pass,' to procuring uniformity of rates charged by each company to its patrons, and to other objects of a similar nature. The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates." (Page 315.)

In other words, the court showed that the agreement to maintain rates, which the court then had under consideration, was not forbidden by the Interstate Commerce Act, although the court proceeded to hold that it was forbidden by the Anti-Trust Act, and was, therefore, void.

Then again, the distinction between the two acts is very clearly brought out in United States v. Joint Traffic Association, 171 U. S. 505, heretofore referred to, where again there was involved the validity of an agreement to maintain rates, and where it was sought to distinguish the case then before the court from the Freight Association case just mentioned, on the ground that careful provision was made in the contract before the court in the Joint Traffic Association case to see that the rates were *reasonable.* But on this subject the court said:

> "It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. *The distinction is unimportant.* It was considered in the other case that the rates actually fixed upon were

> reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that *each company charges the rates agreed upon* and receives its equitable proportion of the traffic." (Page 565.)

And the court held that the agreement to maintain these rates, although they were admitted to be reasonable rates, and would therefore, of course, not contravene the Act to Regulate Commerce, was void, because forbidden by the Anti-Trust Act.

From this consideration of the purpose and effect of these two acts, to-wit, the Act to Regulate Commerce and the Anti-Trust Act, it is perfectly evident that the inquiry ordered by the Interstate Commerce Commission, and which is now the subject of consideration, was to ascertain whether or not facts existed which would constitute *a violation of the Anti-Trust Act,* and not as to facts which would constitute a violation of the Act to Regulate Commerce. This is apparent from almost every paragraph of the order, and is certainly apparent when the various paragraphs are read together, except paragraph 13, on the subject of passes, and which is not now material because the Commission's examiners received all the information called for by that paragraph, which they desired.

It is perfectly evident that the whole object of the inquiry was to ascertain facts bearing on the subject of *restraint of competition, creation of monopoly* and the

maintenance of fixed rates. In other words, the inquiry was, not into facts bearing on the question of whether the railroad companies were, or were not, charging reasonable rates, or whether they were, or were not, discriminating in rates, but as to whether or not they were, either by direct purchase, or by lease, or by control through the ownership of stock, restricting competition and maintaining fixed rates (whether reasonable or unreasonable).

Thus take the four first paragraphs of the order of inquiry. They inquire (1) what securities of the Nashville, Chattanooga & St. Louis are owned by the Louisville & Nashville; (2) what other railroads either of these two have purchased or entered into arrangements with for the purpose of control; (3) whether the Louisville & Nashville and the Nashville, Chattanooga & St. Louis R'y serve the same territory, and whether, under separate ownerships, they would be competitive, and (4) any other facts as to their relations *"tending to show whether these relations restrict competition and maintain fixed rates."* And the remaining paragraphs of the order (except the 13th) are of the same character, though embracing other railroads.

It seems to us to require no further argument than is made by the mere statement of the facts, supported by reference to the language of the order, to show that the Commission was not seeking information bearing upon the question of the reasonableness of any rates, or discrimination between any shippers, places, or commodities, but was simply seeking information as to facts bear-

ing upon the suggestion of suppression of competition, or agreements or combinations for the maintenance of fixed rates; and, therefore, that the Commission had no authority by law to make the inquiries or the examination which it was seeking to make and which it demanded the right to make, and which was refused.

The Solicitor General argues in his brief that the Commission often inquires into questions of competition between railroad companies. Of course this is true in a sense. But, these inquiries are made, or these facts as to competition are considered, merely as they bear upon the question of reasonableness of rates, or alleged unjust discrimination between places, or persons or traffic as, for example, where it is insisted that a comparison between two different rates shows an unjust discrimination, and where in defense of the rates it is shown that in the one case there is competition, while in the other case there is not. But to hear evidence as to competition and to consider competition as bearing upon the reasonableness of rates, or upon a charge of discrimination, is a totally different thing from an investigation upon the subject of suppressing competition or creating monopoly. The one is a legitimate inquiry upon subjects within the jurisdiction of the Interstate Commerce Commission, directly bearing upon the enforcement of the Interstate Commerce Act, or its violation, and the other is an illegitimate inquiry bearing upon possible violations of the Anti-Trust Act.

There is one section, Section 5 of the Interstate Commerce Act, which the Solicitor General briefly mentions,

which does bear upon the matter of competition between railroads by prohibiting one particular thing, to-wit, *the pooling of freights* or *division of earnings* of competing roads. But as this is so distinct a subject, it is impossible to believe that, if either the Senate in passing its resolution, or the Commission in making its order, had intended to make an inquiry on that subject, which it would have been so easy to describe, it would have said so. But we see that in all the long and detailed provisions of the resolution and order there is no reference to this subject of pooling of freights or division of earnings, and manifestly it was not in the mind either of the Senate or the Commission.

III.

The Commission's Inquisitorial Powers are not Without Limit.

The Solicitor General, however, insists, if we understand his argument, that the Interstate Commerce Commission's power of inquiry into the affairs of a railroad corporation and of examination of its books and papers, is without limit, either as to purpose or subject-matter; that it is not required to say what it desires to examine or why it desires to examine it. If this be true, then, if the Commission should desire to make an investigation or examination for the purpose of determining whether or not the tariff laws had been violated and thus to carry out its view of the law which it urged in Texas & Pacific Railway v. Interstate Commerce Commission, 162 U. S.

221, to-wit: "that it is the duty of the Commission to so construe the Act to Regulate Commerce as to make it practically co-operate with what is assumed to be the policy of the tariff laws" it could do so, although this court held in that case that the Commission's view of its powers was erroneous and that the court's reading of the Interstate Commerce Act did not disclose any purpose on the part of Congress "to thereby re-enforce the provisions of the tariff laws" (page 221). Or, if the Commission should choose to make an examination for the purpose of aiding the Post Office Department in an inquiry as to whether or not any of the Postal laws had been violated, it could do so, although the Act to Regulate Commerce, and the Commission created under that act, have nothing whatever to do with the enforcement of the Postal laws.

Without considering for the present the question of the *power* of Congress to make the Interstate Commerce Commission either a general government inspector or detective, in aid of all of its departments, and to vest in the Commission, therefore, powers of examination sufficient for the accomplishment of such a purpose, we submit that Congress has not attempted to exercise any such power or do any such thing.

Counsel for the government refers to the provisions of Section 12 of the Act to Regulate Commerce, giving the Commission "authority to inquire into the management of the business of all common carriers subject to the provisions of this act." And requiring it "to keep itself informed as to the manner and method in which

the same is conducted"; and also to Section 21 of the act, making it the duty of the Commission to report annually to Congress, giving "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary"; and also to Section 20 of the act, saying the Commission "shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act." So far as Sections 12 and 21 are concerned, they stand today just as they have stood without amendment in any respect since 1891. The right of access to "accounts, records and memoranda" now given by Section 20 was introduced into the Interstate Commerce Act by the Hepburn Amendment of June 29, 1906.

These different sections of the act, and the extent of the powers thereby granted, have heretofore received consideration by this court. Counsel for the government refer several times to the case of Interstate Commerce Commission v. Brimson, 154 U. S. 447, in support of the claim of broad authority in the Commission in respect to inquisitorial powers. But that case is certainly far from laying down the proposition that the Commission's power of examination is without limit as to object or purpose. On the contrary, the opinion of the court shows beyond a question that the Commission's power in this respect is a limited power, and is confined to matters involved in the enforcement of the Commerce Act.

The court, speaking of the provision contained in Section 12 of the act, empowering the Commission to examine into the management of the affairs of the carriers, says the Commission is entitled in that way "to obtain full and accurate information of all matters involved in the enforcement of the Act of Congress," referring to the Act to Regulate Commerce. (Page 473.)

Again, in speaking of the duty of the citizen to obey the law and to appear and testify and produce books, papers, etc., when called upon by the Commission, the court says:

> "This power conferred upon the Commission imposes upon anyone, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, *if such matter is one which the Commission is legally entitled to investigate,* and if the witness is not excused on some personal ground from doing what the Commission requires at his hand" (page 476).

Again, in responding to the argument that the twelfth section is in derogation of the fundamental guarantees of personal rights recognized by the Constitution, the court says this is not true, and referring to the fact that any question raised by the witness would have to be decided by a court before he could be compelled to answer or to produce any book or paper, the court says:

> "Suffice it in the present case to say that as the Interstate Commerce Commission by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; *or that neither the questions propounded nor the books, papers, etc., called for, relate to the particular matter under investigation, nor to any matter which the Commission is entitled, under the Constitution or laws to investigate.*" (Page 479.)

And finally in directing the form of the judgment to be entered on the appeal, the lower court, having refused to require the witness to answer solely on the ground that the act imposing this duty on the court was unconstitutional, the Supreme Court noting the fact that "no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants," said:

> "Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it *upon the merits* of the questions presented by the petition and the answer of the defendants and make such determination thereof as may be consistent with the law." (Page 490.)

It would not be possible to show more clearly than this Brimson case does show that the power of the Com-

mission as to examination of witnesses or to call for the production of papers, books, documents, etc., is not an unlimited power, but is one that can only be exercised to enable the Commission to perform its duty under the law creating it. And that any witness called upon to answer a question or to produce a book, paper or document can make the objection that "neither the questions propounded nor the books, papers, etc., called for related to the particular matter under investigation, nor to any matter which the Commission is entitled, under the Constitution or laws to investigate." And if that proposition is true, then it inevitably results that the Commission's inquisitorial power is not unlimited and that it can not examine whatever it pleases, and for whatever purpose it pleases.

Neither Section 12 nor Section 21, upon the broad language of which counsel for the government rely, has been changed in any particular since the decision of this court in the Brimson case.

SECTION 20 OF THE ACT TO REGULATE COMMERCE.

Section 20 of the Commerce Act was, however, amended by the Hepburn Act of June, 1906, by which amendment certain power was given the Commission to make personal examination of certain things therein specified. And to that we now call attention. And before quoting the words of the statute, we call attention to this suggestion: The court had long before the passage of this act held, as we have just seen, that the powers and duties of examination imposed upon the Commis-

sion by the act did not give it the unlimited right to examine whatever it pleased and for whatever purpose it pleased, and had held the question as to the relevancy or materiality of the books, papers, etc., "to the particular matter under investigation" and as to whether or not the matter was one "which the Commission is entitled, under the Constitution or laws, to investigate" could be raised in court when the books or papers were called for. And it would surely take strong, plain language in the Amendment of 1906 to satisfy the mind that, because Congress gave the Commission power to make certain personal examination at the carrier's place of business, which examination is necessarily made out of the presence of the court, it was intended by the mere fact that an additional *mode of examination* was provided to take away all limits upon the purposes for which the Commission could make the examination, or the books, papers, etc., which it could examine.

By the Hepburn Amendment of June, 1906, the following provision was inserted in Section 20 of the Act, to-wit:

> "The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by

the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this act.

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, multilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both."

It is now insisted that by virtue of the language of this amendment, the Commission, by its examiners, can step into any office of the carrier at any time and examine whatever he pleases, for whatever purpose he pleases, and no matter what the date of the transaction concerning which he desires to inquire, or the date at which the record was made or a letter written; that in case of the Louisville & Nashville Railroad Company, for example, the examiner can, if he so desires, go back over a course of sixty years in his examinations.

We submit that the act is susceptible of no such construction. And, to narrow the case to a question which was sharply made in the present case, we submit that this act only gives the Commission's examiner the right to examine "accounts, records and memoranda," *as those terms are used in this act, and with the meaning which the act plainly gives them;* and that they manifestly refer merely to statistical information with reference to "the movement of traffic as well as the receipts and expenditures of moneys," to-wit, such information as is contained not only in financial accounts, but accounts of the mileage made over a road by its engines or cars and

its tonnage, and matters of that kind, which will enable the Commission to determine the amount of business being done on any part of a road or the whole of it, and what it is costing per mile or per ton, etc.; but that the term "accounts, records and memoranda" as used in this amendment, *manifestly does not include mere* CORRESPONDENCE.

No person, natural or artificial, engaged in business, wants all of his plans revealed to an outsider. Not only is there contained in the correspondence communications between a business corporation and its legal counsel, communications which have been privileged for hundreds of years by the English common law, but there are often set forth plans of operation, which would be defeated if made public, or out of the publication of which great injury would result without benfit to anyone. Suppose, for example, a railroad corporation contemplates the building of a new line into new territory, passing possibly through a section of country where there is only one feasible route—and we refer to this specially, because that very situation has several times arisen in the case of the client for which we now speak. If its plans, as indicated by the correspondence between its departments or counsel are required to be made public, a competitor may seek to forestall it by taking prior possession of the only feasible route for the projected line; and property all along the line may advance to prohibitive prices. And thus the whole project may be defeated.

Again, there are frequently communications between employers of labor and concerning the relations between

employer and employes, questions involving labor organizations, and the relations between them and employers, all of which are matters of great delicacy and privacy and which the employer does not care to have published, any more than the labor organizations would care to have their communications among themselves made public.

Yet if the Interstate Commerce Commission is given the power to examine into all of these things and read all this correspondence, there is no limitation in law as to the use it can make of it, or as to the preservation of its secrecy. It is true, the statute in question says "any *examiner* who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject" to a fine or imprisonment. But this provision refers only to *the examiner*. It does not refer to the Commission, and it does not impose any restriction upon the right or power of the Commission to make public whatever it chooses to make public.

We have merely called attention to these matters, because we believe they are pertinent in considering whether or not Congress intended that this unlimited right of search should exist, or whether, on the other hand, the things which the act gives the Commission the right to examine are limited by the terms of the act, and if so, what they are.

Before taking up in detail the language of the amendment in question, the history of it is both interesting and

instructive, as bearing upon its meaning by way of showing the *purpose* of those who framed it. It was framed and presented to Congress in the form of a bill by the Interstate Commerce Commission, as is shown in its 19th annual report (Report of 1905), in which report will be found the amendment exactly as now found in the statute (see Appendix to the Report); and in explaining the amendment, the Commission in this report shows beyond question that what it desired to accomplish was to require the keeping of certain forms of *books of account* and to give the Commission the right of examination thereof and to require certain *statistical returns* from the carrier. In the report mentioned, we find the following language *under the following heading,* to-wit:

"EXAMINATION OF BOOKS OF ACCOUNT.

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe a form in which *books of account* shall be kept by railways, with the right on the part of the Commission to *examine such books* at any and all times *through expert accountants.* This recommendation has been urged upon the attention of the Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this and the detection and punishment of rebates and kindred wrongdoing.

"We have also called attention to the fact that certain carriers now refuse to make the *statistical returns* required by the Commission. For example, railways are required, among other things, to indicate what permanent improvements have been charged to operating improvements. Without an answer to this question, it is impossible to determine

to what extent gross earnings have been used in improving the property and the actual cost of operation proper. Admitting the right of a railroad company to use its money as it sees fit, it is certainly proper that the government should know what use is made of it, for the purpose of determining whether the rates and charges imposed are legitimate. Certain important railways decline to furnish this information at all and others furnish it in a very imperfect and unsatisfactory manner.

"We have also recently required carriers to furnish statistics *showing the rate per ton-mile* actually received for the movement of certain kinds of carload traffic, but this requirement has not been generally complied with." (Interstate Commerce Report of 1905, page 11.)

We do not see in this report of the Commission, which thus explained the purpose of the identical amendment, which we are now considering, any suggestion whatever of a purpose to give the Commission the right to examine all *the correspondence* of a carrier, or anything except the things which the Commission suggested that the carrier should be required to keep.

Let us now turn to the language of the amendment itself. We have already quoted it. It will be observed that the phrase "accounts, records and memoranda" is used nine times and manifestly means the same thing each time it is used, and, in some of the connections in which it is used, including the first one, it would be a manifest absurdity to suppose that it meant to include correspondence.

Thus the reference to this subject begins as follows:

> "The Commission may, in its discretion, *prescribe the forms* of any and *all* accounts, records and memoranda to be kept by carriers subject to the provisions of this act."

Thus it will be observed that the Commission is not simply given the power to prescribe the forms for *certain* accounts, records and memoranda; but it is given the power to prescribe the forms for *all* accounts, records and memoranda to be kept by carriers subject to the provisions of this act. Manifestly, therefore, Congress had in mind, and the Commission itself, when it recommended this act, had in mind, that character of accounts, records and memoranda *for which forms could be prescribed.* While the Commission is not required to prescribe the form for all such accounts, records and memoranda, yet the fact that it is given the power to prescribe the forms for *all of them* conclusively shows that the accounts, records and memoranda which Congress had in mind, were *such things as could be reduced to forms.* And, of course, it needs no argument, or anything more than the bare suggestion, to show that it would be a manifest absurdity to try to reduce *correspondence* to forms. It is, therefore, inevitably true that where the amendment first uses the expression "accounts, records and memoranda," *it does not include correspondence.*

And this is further made manifest by an explanatory statement in the amendment as to what it includes, to-wit:

> "Including the accounts, records and memoranda of *the movement of traffic* as well as the *receipts and expenditures of money.*"

This explanatory statement shows clearly that what Congress had in mind was statistics of the character referred to in the Commission's report, which we have heretofore quoted; statistics as to the movement of traffic, statistics showing the car mileage, or the train mileage, or the tonnage over different parts of the road, as well as the cost of handling the same, so as to enable the Commission to arrive at "the rate per ton mile," and matters of that kind.

Then immediately follows the language giving the Commission access to these accounts, records and memoranda, the language being:

> "The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act."

Note how exactly the things to which the Commission is here given access correspond to the things for which the Commission is given power to prescribe the forms. In the first provision it is:

> "All accounts, records and memoranda to be kept by carriers subject to the provisions of this act,"

and in the second it is:

> "All accounts, records and memoranda kept by carriers subject to this act."

Thus the things for which the Commission is given power to prescribe the forms, and the things to which the Commission is given access, *are identical.* And we repeat that to suggest that this includes correspondence is an absurdity.

Then the act continues:

> "And it shall be unlawful for such carriers to keep *any other* accounts, records or memoranda than those prescribed or approved by the Commission."

As we have already seen, the Commission is given the power to prescribe the forms for *all* accounts, records and memoranda; and it is contemplated that it may do so; and if it does, then the language just quoted prohibits the carrier from keeping any others. Therefore, if correspondence is included, the carrier could not have any correspondence because it is manifest that the form of it can not be prescribed.

Again the statute says:

> "In case of failure or refusal on the part of any such carrier, receiver or trustee to keep such accounts, records and memoranda *on the books* and in the manner prescribed by the Commission or to submit *such* accounts, records and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier * * * shall forfeit to the United States the sum of $500.00 for each such offense," etc.

Thus the accounts, records and memoranda are matters that are to be kept *upon books,* as well as in a certain form prescribed, and it is "such" accounts, records and memoranda which the carrier is subject to punishment for failing to submit to the inspection of the Commission.

Again the statute says:

> "Any person who shall willfully make any *false entry* in the accounts of any book of accounts or in

> any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter or * * * falsify the record of any such account, record or memoranda, or who shall willfully neglect or fail to make full, true and correct *entries* in such accounts, records or memoranda, * * * *or shall keep any other* accounts, records or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor," etc.

But whoever heard of the writing of a letter being referred to as an "entry" in a record? It is manifest from the language last quoted that the act is referring to records whether in the form of accounts or memoranda, in which, or upon which, according to the ordinary use of language, "entries" can be made, and not to the writing or receipt of letters.

It, therefore, seems to us clear beyond the possibility of a doubt, not only from the history of this act, and the statement of its purpose by its author, but by the very terms of the act itself, that Congress did not have in mind *correspondence* in using the expression "accounts, records and memoranda"; but that in the various places where is used this identical phrase, it has used it with the same meaning; and that when it said:

> "The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this act,"

it included exactly the same things as when it said:

> "The Commission may, in its discretion, *prescribe the forms* of any and *all accounts, records and memoranda to be kept by carriers subject to the provisions of this act.*"

And it would be an absurdity to suppose this to include correspondence.

It is interesting to note for what accounts, records and memoranda, the Commission has, in fact, prescribed forms. These are shown in the first paragraph of the answer in the case at bar (Record, p. 9), showing that they include various classifications of receipts and expenditures, and "classification of locomotive miles, car miles and train miles," etc.

A reference is made by counsel for the government to a proviso added to the amendment to Section 20 as we have heretofore quoted same, which proviso reads as follows:

> "Provided that the Commission may, in its discretion, issue orders specifying such operating, accounting or financial papers, records, books, blanks, tickets, stubs or documents of carriers, which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers or documents shall be preserved."

This amendment was not made as part of the Hepburn Act in June, 1906, but was added by an amendment of February 25, 1909, three years later. It will be observed, it does not use the familiar phrase "accounts, records and memoranda," which ran all through the amendment heretofore quoted. It is manifest, however, that this amendment of February, 1909, giving the Commission power to prescribe what may be destroyed, does not alter the meaning of the Amendment of 1906, giving the Commission power to prescribe forms for all ac-

counts, records and memoranda and giving the Commission access to these. Furthermore, we can see nothing in the language of the Amendment of 1909, that even remotely suggests the idea of an order being made as to when *correspondence* could be destroyed or what correspondence could be destroyed. The language of it is that the Commission may issue orders "specifying such *operating, accounting* or *financial* papers, records, books, blanks, tickets, stubs or documents," etc., which may be destroyed. It will be observed that the qualifying phrase "operating, accounting or financial," applies to each of the substantives following it. In other words, "operating, accounting or financial" *papers,* "operating, accounting or financial" *records,* "operating, accounting or financial" *books,* etc. And certainly this does not include mere correspondence.

IV.

Correspondence Between Carriers and Their Legal Counsel.

Take an illustration of the effect of granting the Government's contention as to the meaning of this act. Among the correspondence in the files of defendant, to which the Commission's examiners demanded unlimited access, and to which it would be given access, if the prayer of its petition for mandamus should be granted, are numerous letters between defendant and its different *legal counsel.* Can it be possible that Congress, by the use of the vague general words found in this act, giving

ileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (*ante*, Sec. 1364), and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (*ante*, Sec. 2190), it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the early outset, as a natural exception to the then novel right of testimonial compulsion." (4 Wigmore on Evidence, Sec. 2290, page 3193.)

It is unbelievable that, by an act which merely provides that the Commission shall "have access to all accounts, records and memoranda kept by carriers subject to this act," and which act was introduced into Congress accompanied by a report from the Interstate Commerce Commission that "an efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the form in which *books of account* shall be kept by railways, with the right on the part of the Commission to examine such *books* at any and all times *through expert accountants*" Congress could possibly have intended to make public correspondence between the railways and their legal counsel, and thus by these terms, or by any terms short of express unequivocal declaration, to abolish as to this class of persons, a privilege so universally understood, so ancient, so important, and so firmly "imbedded in our jurisprudence." Yet this would be the effect of adopting the construction put by the Interstate Commerce Commission upon the

provisions of this 20th section of the Commerce Act as amended by the Hepburn Act of 1906.

But we are not without light from this court as to the meaning of this Commerce Act, and the parts of it bearing upon the inquisitorial powers of the Commission since the amendment of Section 20 by the Hepburn Act of 1906. We refer to Harriman v. Int. Com. Com., 211 U. S. 407. It is true that case did not involve an attempt the part of the Commission to make a personal examination of the books and papers of the carrier, but it did involve the general subject of the Commission's inquisitorial powers; the Commission, in that case as in this case, insisting upon a construction of the statute of the widest possible scope. And this court used the following strong language bearing upon that general subject, to-wit:

> "Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the Act of February 4, 1887, but to aid it in recommending additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, and not an investigation upon complaint or of some specific matter that

might be made the object of a complaint. To answer this claim, it will be sufficient to construe the Act creating the Commission, upon which its powers depend.

"Before taking up the words of the statute, the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. Legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to Commerce with foreign nations or among the several States. And the result of the arguments is that, whatever might influence the mind of the Commission in its recommendations, is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say, only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power if it exists is unparalleled in its vague extent" (p. 417).

Then examining certain provisions of the statute, and especially Section 12, which gives the Commission "authority to inquire into the management of the business of all common carriers, subject to the provisions of this Act," etc., and making it the duty of common carriers to furnish "full and complete information," the court calls attention to the fact that the Commission is only given power to require the testimony of witnesses "for the purposes of this Act." And on that subject, says:

"The Commission, it will be seeen, is given power to require the testimony of witnesses 'for the pur-

poses of this Act.' The argument for the Commission is that the purposes of the Act embrace all the duties that the Act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of carriers is conducted, as required by Section 12; that another is that it shall recommend additional legislation under Section 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

"We are of opinion, *on the contrary*, that the purposes of the Act for which the Commission may exact evidence, embrace only *complaints for a violation of the Act*, and investigations by the Commission upon matters *that might have been made the object of complaint*. As we have already implied, the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law" (p. 419).

Then coming to the very section upon which reliance is now placed, to-wit, Section 20, the court says:

"The only other section which is thought to sustain the argument for the Commission is Section 20, amended by the Act of June 29, 1906. C. 3591, Section 7. 34 Stat. 584, 593. This authorizes the Commission to require annual reports from all the carriers concerned, with details of what is to be shown,

> to which the Commission may add in certain particulars, and further, to require from such carriers 'specific answers to all questions upon which the Commission may need information.' The Commission may require certain other reports, *and is to have access to all accounts, records and memoranda.* The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us that it is directed *solely to 'accounts and returns'* and is imposing a duty on the common carrier only from whom the returns come" (p. 421). Our italics.

Now, it is true, as said before, that in that case, the court was only considering the power to compel the production of books and papers by a witness, and not the Commission's power of personal examination at the office of the company; yet the court did, in the language we have quoted, state what was evidently to the court the plain, natural meaning of the language of the statute as to the keeping of accounts, records and memoranda and the Commission's access to same. And it is our argument to-day that this is the only construction that can be placed upon that statute within reason, if we pay any attention to context, including the frequent repetition of the phrase "accounts, records and memoranda," used manifestly with the same meaning each time it is repeated. And the opinion concludes with a statement of a principle which we shall hereafter mention again, as follows:

> "If we felt more hestitation than we do, we still should feel bound to construe the statute, not merely so as to sustain its constitutionality, but so as to

avoid a succession of constitutional doubts, so far as candor permits" (p. 422).

Our view of this Act is also supported by the application of certain rules of construction, to which we may briefly refer.

V.

Rules of Construction.

The familiar rule of construction ordinarily referred to briefly as "*noscitur a sociis*" throws light upon the construction of the expression "accounts, records and memoranda" as used in the Act under consideration.

In Lewis' Sutherland Statutory Construction, 2d Edition, Volume 2, Section 414, the author says:

> "Not only are words and provisions modified to harmonize with the leading and controlling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. The principle is embodied in the maxim *noscitur a sociis*, and is applicable to the construction of all written instruments. When two or more words are grouped together and have ordinarily a similar meaning, but are not equally comprehensive, they will qualify each other when associated; they may import a conventional sense and have great scope when so used without restriction in the context, and they may be capable of widely different applications when specialized by accompanying provisions expressive of a particular intention or limited application."

This court has had occasion to refer to and to use this rule of construction. In Virginia v. Tennessee, 148 U. S. 503, in construing the constitutional provision against a State's entering "into any agreement or compact with another State," without the consent of Congress, the court said:

> "It is a familiar rule in the construction of terms, to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning taken by itself, its obscurity or doubt may be removed by reference to associated words. The meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used. Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."

This rule of construction is so familiar and has been so often applied, that it would hardly be proper to add citations of authority on the subject. We simply submit that when the words "accounts, records and memoranda" to which the Commission is given access in this statute are read with their context, which refers to prescribing forms for them, and making entries in them, etc., there can be no doubt on the proposition that they do not include correspondence.

We may also refer to the fact that this statute is highly penal. As we have seen from the quotation of its

terms, any person who "shall keep any other accounts, records or memoranda than those prescribed" shall be subject to a fine of not less than $1,000.00 nor more than $5,000.00, or imprisonment for a term of not less than one nor more than three years, or both such fine and imprisonment; and any carrier who shall fail to "submit such accounts, records and memoranda" to the inspection of the Commission or any of its examiners, shall be subject to a "fine of $500.00 for each such offense, and for each and every day of the continuance of such offense." And in the light of this highly penal provision, the statute, by a familiar rule of construction, should be strictly construed, and we can not give it a different construction from that which the context seems plainly to give, merely on account of any theory as to the inconvenience to which the Commission might be subjected if it can not see all the correspondence of carriers.

In the case of United States v. Wiltberger, 5 Wheat. 96, the court, by Chief Justice Marshall, said:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which would be unsafe to consider as precedents for any general rule for other cases."

It is argued in the case at bar that if the Commission is not given access to all of the correspondence of the carrier, there may be some details which the Commission would like to understand, which it would not be able to learn from accounts, records and memoranda kept according to prescribed forms. But the court certainly would not be authorized, on account of any such reasoning as this, to so construe this highly penal statute, when the entire context, as well as the history of the Act, shows that it was not intended to include correspondence.

Another rule of construction is that a statute will be so construed, if possible, as to avoid reasonable doubts as to its constitutionality. We insist, for reasons that we will hereafter elaborate, resting mainly upon the decision of this court in Hale v. Henkel, 201 U. S. 76, that if this statute be given the broad construction for which the Government contends, it will be an attempt to authorize an "unreasonable search" of the books and papers of the carrier, and will, therefore, be violative of the Fourth Amendment to the Federal Constitution. And this court has often announced that it will, if possible, avoid a construction of a statute which will raise candid doubts as to its constitutionality. (Harriman v. Interstate Commerce Commission, 211 U. S. 407-422.)

Thus far we have considered the true construction of the Act as to the *character* of papers that can be examined by the Commission. We now come to consider a question of *date*.

VI.

Right of Examination of Papers Made Prior to the Adoption of the Hepburn Act Amending Section 20 of the Commerce Act.

As heretofore said, the Hepburn Act amending Section 20 of the Act to Regulate Commerce, and providing for the first time that the Commission should "have access to all accounts, records and memoranda kept by the carriers subject to this Act" was passed June 29, 1906, and became effective August 28, 1906. And the Commission now insists that its right of access and examination given by this Act is not only unlimited as to the character or class of papers to be examined, but unlimited in point of time; and that it has the right, in case of the Louisville & Nashville Railroad Company, for example, to go back and examine all of its papers, from the time of its organization, more than sixty years ago.

We submit that Congress had no such right in contemplation, and did not intend to authorize it. Why should the Commission, charged with the duty of enforcing the Interstate Commerce Act, which requires the charging of reasonable rates, and forbids discrimination, rebates, preferences, etc., desire in the year 1914 to go back and examine papers of the Louisville & Nashville Railroad Company made prior to the adoption of the Hepburn Act, more than eight years ago? What relevancy or materiality, so far as appears on the face of things, would old records and papers, made so many years ago, have to any present duty of the Commission?

And, in this connection, it may be well to call attention to the fact that if any book or paper, made prior to the passage of the Hepburn Act (or some paper not coming within the meaning of the terms "accounts, records and memoranda" as heretofore discussed), may be relevant or material to any matter, which the Commission is called on to act upon, its production may still be required and enforced by the process of *subpoena duces tecum* under the law as it existed prior to the adoption of the Hepburn Act and still exists. But we submit that Congress, in authorizing the Commission, by the language of the Hepburn Amendment, to prescribe forms for all accounts, records and memoranda, which provision must manifestly have been only prospective, meant only to give to the Commission the right of access to accounts, records and memoranda created after that date; the main purpose manifestly being to give the Commission the power to examine those accounts, records and memoranda for which it might prescribe forms, so as to see that its orders, in this respect, were complied with, and so as to get the information which the prescription of these forms was intended to provide for. In other words, the purpose of the Act, which became effective August 28, 1906, seems to be to make a change from that date in the keeping of the accounts, records and memoranda of common carriers, subject to the provisions of the Commerce Act, and to provide that thereafter they shall keep their accounts, records and memoranda in such forms as the Commission shall prescribe, and that the Commission shall have the right of access to these accounts, records

and memoranda, for which they are to prescribe forms.

Of course it is a familiar principle of construction that "courts refuse to give statutes retrospective construction unless the intention is so clear and positive as by no possibility to admit of any other construction" (Sedgwick's Construction of Statutes, 166; United States v. A. T. & S. F. R. Co., 142 Fed. 186); and while it possibly may be said with truth that to permit the Commission under this Act of August 28, 1906, to go back and merely examine accounts, records and memoranda, made previous to that date, would not be giving the Act a retrospective effect, yet the principle involved in the rule of construction referred to seems applicable to the consideration of the question now before us. For the rule is a mere rule of construction. It is not based on the constitutional prohibition against *ex post facto* laws, because they are declared to be invalid by the Constitution itself. But the rule of construction against retrospective legislation applies to legislation that *would be valid*, if it were clear that the legislative body *intended* to make its enactment retrospective. And in the case of the statute under consideration, we simply submit that it is not reasonable to suppose that Congress intended by the Act, which became effective August 28, 1906, to give the Commission the right or power to go back for an unlimited period of time and examine all accounts, records and memoranda made by interstate carriers at any time in the past, or at any time prior to the effective date of that Act.

VII.

UNREASONABLE SEARCH AND SEIZURE.

Finally, if, as a mere matter of construction, it be considered that the Commerce Act was intended by Congress to authorize such a search of defendant's papers as was demanded by the examiners of the Interstate Commerce Commission in the matter now under consideration, and as prayed for in the petition for mandamus in the case at bar, then we submit that it is violative of the Fourth Amendment to the Constitution of the United States, which declares:

> "The rights of the people to be secure in their persons, houses, papers and effects against *unreasonable searches and seizures,* shall not be violated, and *no warrants shall issue,* but upon probable cause supported by oath or affirmation, and particularly *describing the place to be searched,* and the persons or *things to be seized.*"

This court has held that corporations come within the protecting provisions of this constitutional amendment against *unreasonable* searches and seizures.

In Hale v. Henkel, 201 U. S. 43, the court said:

> "4. Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an Act of Congress passed in the exercise of its constitutional powers, can not refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity,

under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property can not be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. Gulf, etc., Railroad Company v. Ellis, 165 U. S. 150, 154, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

"We are also of the opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, *be he individual or corporation*, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

"If the writ had required the production of all books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte* Brown, 72 Missouri, 83; Shaftsbury v. Arrowsmith, 4 Ves. 66; Lee v. Angas, L. R. 2 Eq. 59." (Pages 75, 76, 77.)

It is true that the court also made the following statement in the opinion from which we have just quoted:

"Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by Act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment." (Page 77.)

Just exactly what the court meant by this last statement we do not clearly understand. But it could not have meant that *any* search in connection with interstate

commerce which Congress may attempt to authorize, however unlimited and however unreasonable, will be legal, because, as very pertinently said by Mr. Justice Harlan in his dissenting opinion in that case:

> "If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an Act of Congress? *Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment.*" (Page 79.)

And in a later case, Wilson v. United States, 221 U. S. 382, in discussing the status of the books and papers of a corporation, in a case, by the way, where *the corporation* was not insisting on any privilege of privacy, the court in speaking of a governmental demand for examination said:

> "That demand, expressed in lawful process, *confining its requirements within the limits which* REASON *imposes in the circumstances of the case,* the corporation has no privilege to refuse" (p. 382).

This language seems to us to have been intended to guard against *unreasonable* search of corporate papers.

Clearly, therefore, if the search which the examiners of the Commission sought to make, and the right to which they asked the court to enforce by the writ of mandamus in the case at bar, was an *unreasonable* search, a search which would have been held to be unreasonable if attempted to be enforced by the writ of *subpoena duces*

tecum or by a *search warrant,* then it was unreasonable if sought to be enforced either by physical force or by the writ of mandamus as in the present case.

The fundamental question to be considered and decided is as to whether or not the search attempted was an unreasonable search, and is not as to the mere manner of enforcing the right; the one is a matter of substance and the other is a matter of form only; and when the framers of the Fourth Amendment to the Constitution put it into that sacred instrument, they were concerned with matters of substance and not with mere matters of form; and the language of the amendment goes to the substance, and not to the form.

In Hale v. Henkel, in the language we have heretofore quoted, the court held that a *subpoena duces tecum* which commanded the witness to produce "all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union" was *"far too sweeping in its terms to be regarded as reasonable."* And the court said that "a general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." But how much more sweeping and incapable of defense against illegal demands is the search sought to be enforced in the case

at bar? Nothing is excluded. The prayer is that the court, by its writ of mandamus enforce the right of an examiner of the Commission to enter any office of the defendant and to search and make copies from anything he pleases, without limitation or exception, and without any statement of purpose or reason. If there can be, within contemplation of law, an unreasonable search of the papers of a corporation, then surely this is an unreasonable search. If it is not, then there is no such thing. And this court has said there is such a thing.

In case of a *subpoena duces tecum* the papers referred to, and covered by the writ, can not be introduced in evidence, if objected to, until the right to put them in evidence has been determined by a court; and thus the owner of the papers has the benefit of judicial protection against any improper use sought to be made of his papers. But not so in the case of the character of search now demanded, and the writ of mandamus by which it is sought to be enforced. If the prayer of this petition be granted and a writ of mandamus in accordance therewith be issued, then the examiner of the Interstate Commerce Commission will be allowed to enter any office of the defendant, seize any paper he pleases, no matter what its character, read it, copy it, or make extracts from it, for the purpose of filing the same among the records of the Interstate Commerce Commission; and if any representative of the defendant objects to the examiner's right to inspect any particular paper or to copy it, or make other use of it, there is no court to determine that question. The examiner, a mere employee of the Interstate

Commerce Commission, itself a mere ministerial tribunal, is detective, inspector and judge, all in one person.

In fact, we understand that the Commission insists upon the right to make this search and examination without even letting any representative of the defendant know what is being examined—in other words, the right to make this unlimited examination of everything in the office, without even the right of any representative of the company to be present at the examination, so that the company shall not even know what the Commission's examiner is examining.

In the case *In re* Pacific R'y Commission, 32 Fed. Rep. 241, Judge Sawyer, in his opinion concurring with Mr. Justice Field in that celebrated case, and speaking of a commission created by Congress to examine into the affairs of the Central Pacific Railroad Company, which, by the way, was *a corporation,* said:

> "A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a Commission without any allegations, upon no fixed principles, and governed by no rules of law or evidence, and no restrictions except its own will or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and *an intolerable tyranny*" (p. 263).

No more exact description of the authority claimed by the Interstate Commission in the case at bar could be written than in the words of Judge Sawyer, just quoted.

We do not know how to enforce our point by any argument that would make it plainer than the simple state-

ment of the demand insisted upon. The matter seems to us to come back to the original question, simply as to whether a corporation is, or is not, within the protection of the Fourth Amendment against unreasonable searches and seizures; because, as said before, if such a thing as an unreasonable search of a corporation's papers is a legal possibility, then the right of search here insisted upon is such. It will be observed from reading the petition in the case at bar that there is no statement that the defendant has violated any provision of the Interstate Commerce Act, nor even that it is suspected of having violated any provision thereof. On the contrary, as we have attempted to show in a previous part of this brief, the manifest object of the examination is to find out whether or not the corporation has violated the Sherman Anti-Trust Act. But the Government, and the Interstate Commerce Commission as a branch of the Government, now insist that the purpose of the examination is wholly immaterial; that the Commission has the right to examine any paper it pleases, for any purpose it pleases, or, without the statement of any purpose—in other words, the absolute, unlimited and uncontrollable right of search of the "houses, papers and effects" of this defendant. And we submit that no such right exists.

VIII.

GROUND OF THE DISTRICT COURT'S JUDGMENT.

In view of the foregoing discussion, the court will doubtless be better able to understand and appreciate the ground upon which the District Court overruled the motion for mandamus and dismissed the petition in the case at bar. The court, in its opinion, called attention to the fact that the petition did not indicate what the Commission desired to examine, and therefore gave the court no opportunity to determine whether any particular book or paper, which the Commission might desire to examine, was a proper subject of examination or not. The court said:

> "To grant the writ in the broad and general, not to say unlimited, terms asked for might indeed uphold plaintiff's contention as to the powers of the Interstate Commerce Commission, but might be perilously near the unreasonable search forbidden by the Constitution. If the plaintiff had propounded claims to relief in such separately stated propositions as were based upon a general, but exact, description of the class of records which had been demanded, but which the examiner had failed to obtain, we might then be able to discriminate and grant such parts of the relief sought as appeared to be proper, while denying the rest. But where the plaintiff asks an *unlimited roving commission* for the examiners, without making such specific averments as will enable the court to discriminate in its judgment between what may be properly granted and what not, we think no title to any relief is made clear by the plaintiff, who must adequately and sufficiently show its claim to be well founded, at least

in part. Here such confusion exists between what might be good and what bad that the court does not think it discreet to grant the writ prayed for as the case is now presented." (Record, 25.)

IX.

CONCLUSION.

In conclusion we submit that the District Court was certainly right in overruling the motion for a mandamus, and in dismissing the petition; but we submit further that the petition should have been dismissed absolutely, because, while the petition is vague and general, it does show that the only right of inspection refused was as to "accounts, records and memoranda" *existing prior to the effective date of the Hepburn Amendment,* August 28, 1906, and CORRESPONDENCE *subsequent to that date.*

It will be observed from the petition that it first states the refusal of defendant to give it "access to or opportunity to examine said accounts, records and memoranda of said defendant *made prior to August 28, 1906*" (Record, 6); and then, after stating the refusal of defendant to give "access to and opportunity to examine the accounts, records and memoranda kept by said defendant *on and subsequent to said August 28, 1906,* INCLUDING THE CORRESPONDENCE *received by said defendant on and subsequent to said date,*" it then adds this explanatory clause, to-wit:

> "*That is to say,* that said defendant and its said officers and agents failed and refused to give either to said Commission or to said Carleton, agent and

examiner as aforesaid, access to or opportunity to examine *said correspondence* received by said defendant *on and subsequent to said August 28, 1906.*" (Record, 6.)

It is true that following the foregoing statements of the petition it does add this extremely general statement:

> "And said defendant and its said officers and agents failed and refused to give, either to said Commission or to said Carleton, agent and examiner as aforesaid, access to or opportunity to examine *other* accounts, records and memoranda of said defendant made on and subsequent to said August 28, 1906." (Record, 6.)

But the bill of exceptions shows that the refusals of defendant were in writing, to-wit, in the form of letters, which letters are quoted in the testimony of the examiner of the Commission, and these show that so far as the period subsequent to August 28, 1906, is concerned, the refusal simply related to *correspondence* and to the records of destruction of papers "relating to papers prior to that date" (Mapother's letters of Feb'y 11, 1914, and Feb'y 12, 1914; Record, 30).

Respectfully submitted,

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November 30, 1914.

APPENDIX.

OPINION OF JUDGE SANFORD.

IN THE UNITED STATES DISTRICT COURT FOR THE NASHVILLE DIVISION OF THE MIDDLE DISTRICT OF TENNESSEE.

UNITED STATES OF AMERICA,

vs. No. 1138 At Law.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

OPINION ON THE PLAINTIFF'S MOTION FOR A WRIT OF MANDAMUS.

The plaintiff's verified petition for a writ of mandamus alleged that this suit was instituted by the district attorney, under the direction of the Attorney General and at the request of the Interstate Commerce Commission; that the defendant is a common carrier engaged in interstate commerce and subject to the Interstate Commerce Act; that the Commission is, under Sections 12 and 20 of said Act, as amended, vested with certain powers and charged with certain duties as set forth in the petition, including, under Section 20, the right, at all

times, to have "access to all accounts, records and memoranda" kept by carriers subject to the Act and to "employ special agents, or examiners who shall have authority under the order of the Commission to inspect and examine" any and all of the same; that on November 6, 1913, the Senate of the United States adopted a certain resolution set forth in the petition (which fully appears in United States v. Louisville Railroad (D. C.), 212 Fed. 486, 489), whereby, in thirteen separate paragraphs, the Commission was directed to investigate and report to the Senate as to the relations between the defendant and the Louisville & Nashville Railroad, and the relations and conduct of these and other railroads in respect to various matters set out in the resolution, including, in the last paragraph, the number of free passes issued by the defendant, since January 1, 1911, to public officials, or at their request, with the total mileage and money value thereof; that the Commission for the purpose of enabling it to perform the duties imposed upon it by the Act had appointed two special agents and examiners and "duly authorized them to inspect the accounts, records and memoranda" of the defendant; that on February 6, 1914, the Commission, through one of said agents and examiners, had applied to the defendant "for access to and opportunity to examine the accounts, records and memoranda kept by said defendant, including the correspondence received by said defendant and copies of correspondence sent by said defendant and also the indices pertaining to said correspondence and copies"; that the defendant had failed and refused to give the Commission

or its said agent and examiner, access to or opportunity to examine the same, "namely, said correspondence and copies of correspondence and indexes thereto"; that in many instances the only detailed account, record and memorandum of a transaction relating to the defendant's business as a common carrier kept by it, is contained in the said correspondence and copies; and that "in pursuance of said Commission's duty under the law, and in obedience to said resolution of the Senate hereinabove set out, and to enable said Commission to perform the functions for which it was created," it was the duty of the Commission to obtain access to and examine through said agents and examiners all of said accounts, records and memoranda, including said correspondence, copies and indexes, and the duty of the defendant to give it and them such access and opportunity of inspection. Wherefore, the plaintiff prayed the court to issue a writ of mandamus commanding the defendant to comply with said provisions of the Interstate Commerce Act, and to give the Commission, its agents and examiners, access to its accounts, records and memoranda, including said correspondence, copies and indexes, and an opportunity to examine the same, and "also opportunity to inspect and examine any and all other accounts, records and memoranda, including correspondence, copies of correspondence, indexes to such correspondence and other indexes kept by said defendant"; and for general relief.

The affidavit of said special agent and examiner, which was filed with the petition, set forth the demand made by him upon the defendant for access to and oppor-

tunity to examine its accounts, records and memoranda, including said correspondence, copies and indexes, and the refusal of the defendant to give him, as such special agent and examiner, either access to or opportunity to inspect and examine the same, namely, said correspondence and copies of correspondence and indexes thereto.

The defendant's verified answer alleged that on November 10, 1913, the Commission had passed an order, set forth in the petition, instituting an investigation concerning the matters set forth in said Senate resolution, which was served upon the defendant and "is the order of the Commission for the examination mentioned in the petition"; that about February 2, 1914, two examiners of the Commission had reported at the defendant's offices and were given access to its "accounts, records and memoranda" as contemplated in Section 20 of the Interstate Commerce Act; that they subsequently demanded the privilege of examining all papers relating to the issuance of free transportation, and while the defendant did not recognize their authority to inspect said papers, it had nevertheless complied with said demand and furnished them the list of those to whom annual passes had been issued, the stubs showing to whom trip passes had been issued, and all correspondence relating thereto; that about February 6, 1914, one of said examiners applied to the defendant for complete and unlimited access to and opportunity to examine the general correspondence files and indexes pertaining thereto, in the offices of the President and General Manager, the Vice President and Traffic Manager, and other officers and agents of the

defendant; that this application and demand was refused; that said examiner made no demand for any special or particular files of correspondence, but his demand was a general one to have complete, full and unlimited access to the correspondence files and their indices, and this was the only demand of said examiner which was refused by defendant; that the "accounts, records and memoranda" to which the examiners were given access under Section 20 of the Act did not embrace such correspondence or indices; that the defendant's general correspondence files contained private and confidential communications between its various officers and agents relative to its internal affairs, its proposed constructions and extensions, and a variety of other subjects of a private, confidential nature which did not in any way relate to the provisions of the Interstate Commerce Act or any other Act as to whose enforcement any duty had been imposed upon the Commission, and also contained confidential, private and privileged communications between the defendant and its attorneys; that the only detailed account, record and memorandum of a transaction relative to its business as a common carrier was not in many instances contained in such correspondence and copies; and it was not the duty of the Commission to obtain access to or examine, through its agents and examiners, defendant's said correspondence, copies of correspondence and indices, and not the duty of the defendant to give said examiners access thereto; that the first twelve paragraphs of said Senate resolution, as embraced in the aforesaid order of the Commission, involve matters

wholly foreign to the authority, duties and obligations of the Commission under the Interstate Commerce Act, and are beyond the purview and jurisdiction of the Commission and pertain wholly to the enforcement of the Anti-trust Act, as to which there is no duty imposed upon the Commission; that four of said paragraphs pertain to matters as to which the defendant is in no way concerned or connected; that as to the inquiries made in the thirteenth paragraph in regard to passes, the defendant had furnished information to the examiners, as stated; that Section 20 of the Interstate Commerce Commission Act authorized the Commission to prescribe the forms of any and all "accounts, records and memoranda" to be kept by carriers subject thereto, and that, under said provision, the Commission had prescribed a uniform system of railway accounting, including orders as to the Classification of Operating Expenses, of Expenditures for Road and Equipment, of Revenues and Expenses for Outside Operations, of Locomotive Miles, Car Miles and Train Miles, and of Expenditures for Additions and Betterments, and Forms of General Balance Sheet Statement and of Income and Profit and Loss Statement, and had thereby prescribed in detail a general accounting system for all carriers subject to the Act; that the defendant had complied with all the forms that had been prescribed by the Commission, and the Commission and its examiners had had full and complete access to same; that the Commission had never undertaken to prescribe any forms for correspondence between officials of the various departments of the defendant, or be-

tween such officials and officials of other carriers or the general public, and that obviously forms for correspondence could not be prescribed; that said Senate Resolution could not confer upon the Commission or its examiners any authority which the Commission did not have under the Interstate Commerce Act and its amendments; that the demand for a general inspection of all the defendant's indices and correspondence was in violation of the provision of the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures; and that if the Interstate Commerce Act should be construed as conferring upon the Commission and its examiners the authority to have access to all such correspondence files and indices, it is unconstitutional and in violation of said amendment.

The motion for the issuance of a writ of mandamus, which follows literally the prayer of the petition, was heard upon the petition and supporting affidavit, the answer, and a copy of the Commission's order of November 10, 1913, instituting an investigation of the matters set forth in the Senate resolution. Being thus heard upon the pleadings the motion is equivalent to a demurrer to the answer, and admits, for present purposes, the truth of all averments of fact well pleaded therein. Merrill v. County Treasurer, 61 Mich. 95, 97; Board v. Board of Supervisors, 51 Miss. 542, 544; Ward v. Flood, 48 Cal. 36, 46; State v. Adams, 161 Mo. 349, 362; Harris v. State, 96 Tenn. 496, 513; High Extraordinary Legal Remedy (3d Ed.) Sec. 527, p. 490. And see Matter of Steinway, 159 N. Y. 250, 254.

It is to be noted, at the outset, that neither the petition nor supporting affidavit alleges, in effect, any refusal by the defendant to give the examiner access to any of its "accounts, records and memoranda" other than correspondence received, copies of correspondence sent and the indices thereto. And since the answer alleges that the Commission and its examiners have had complete access to all the defendants "accounts, records and memoranda" kept in accordance with the forms prescribed by the Commission, and that the examiners have also been furnished with all correspondence relating to the issuance of passes, and that the only demand made by the examiner which the defendant refused was a "general" demand to have "complete, full and unlimited access" to its general correspondence files and the indices thereto (a fact which was not denied at the hearing), it is clear that the sole issue now presented is as to the plaintiff's right to a writ of mandamus compelling the defendant to allow such unlimited access to its general correspondence.

It is well settled that in the absence of statutory authority, the district courts of the United States can not issue the writ of mandamus, as an original and independent remedy, and are limited to its use as a process in the enforcement of rights in aid of a jurisdiction previously acquired by the court for other purposes. Heine v. Levee, Commissioners, 19 Wall. 655, 660; Smith v. Bourbon County, 127 U. S. 105, 112; United States v. Louisville Railroad (D. C.) *sup.* at p. 492. The plaintiff's right to the issuance of the writ in the present case must there-

fore rest, if it exists at all, upon the provision in Section 20 of the Interstate Commerce Act that the district courts of the United States "shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to Regulate Commerce or of any act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said acts, or any of them."

It is earnestly insisted by the defendant, *in limine*, that under the general averments of the petition (which nowhere specifically alleges that the Commission has by any "order" authorized its agents and examiners to inspect the defendant's accounts, records and memoranda for any purpose coming within the provisions of the Interstate Commerce Act, or states the specific objects of the examination of the defendant's correspondence sought to be made by the examiners), and in view of the allegation in the answer that the order of the Commission instituting an investigation into the matters set forth in the Senate resolution (which does not direct any investigation by means of examiners) it must be held, under the rule of pleadings above stated, that the sole order of the Commission authorizing the examiners to inspect the defendant's correspondence is one made for the purpose of carrying out the investigation directed by the Senate resolution, and that as this resolution is not a law of the United States and does not enlarge in

any manner the authority or jurisdiction of the Commission under the Interstate Commerce Act, the defendant's refusal to permit an examination of its correspondence under such order and for such purpose would not, in any event, be a violation of any provision of the Act, and that, hence, all other questions aside, there would be no authority under Section 20 of the Act for the issuance of a writ of mandamus as prayed. Without, however, determining this question, which depends primarily upon a narrow question of pleading, whose solution is rendered unsatisfactory by the somewhat general and vague nature of the allegations of both the petition and answer, I think it proper, in view of the importance of the question involved on the merits of the case, to proceed to its consideration, upon the assumption, for present purposes, that, upon this motion, it sufficiently appears that the examiner to whom access to the defendant's general correspondence was refused, had, by proper order of the Commission been duly authorized to inspect the accounts, records and memoranda of the defendant for the double purpose of performing the general duties devolving upon the Commission under the Interstate Commerce Act, and of making the specific investigation directed by the Senate resolution. It is clear, however, that the Senate resolution, which does not appear to have either been concurred in by the House of Representatives, or approved by the President, is not a law of the United States, and does not, as was conceded at the hearing, enlarge in any manner the authority or jurisdiction of the Commission under the Interstate Commerce Act.

United States v. Louisville Railroad (sup.) at p. 492. Obviously, therefore, in so far as the examination sought to be made by the Commission for the purpose of carrying out the investigation directed by the Senate resolution, did not fall within the general authority of the Commission, independently of such resolution, the defendant's refusal to permit an examination of its correspondence for such purpose, would not be a failure to comply with any provision of the Interstate Commerce Act or a violation thereof, or constitute a ground for the issuance of the writ of mandamus herein. United States v. Louisville Railroad (D. C.) *sup.* at p. 402. And, in its ultimate analysis, the plaintiff's right to the issuance of the writ must hence in this aspect of the case depend upon the question whether, under the Interstate Commerce Act, the Commission is authorized in the general performance of its duties to obtain, through its duly authorized examiners, access to the general correspondence of the defendant and opportunity to examine same, and, consequently, whether in denying such access and opportunity for examination, the defendant has violated any provisions of said Act. If so, independently of other considerations, the plaintiff is entitled to the writ of mandamus; otherwise not.

The provisions of Sections 12 and 20 of the Interstate Commerce Act, in so far as pertinent to the consideration of this question, are, in substance, as follows:

Section 12 of the Act, as amended, provides "That the Commission * * * shall have authority to inquire into the management of the business of all common car-

riers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of this Act and for the punishment of all violations thereof * * * and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, tariffs, contracts, agreements, and documents relating to any matter under investigation. * * * And in case of disobedience to a subpoena the Commission * * * may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

Section 20 of the Act, as amended, authorized the Commission to require annual reports, under oath, from all common carriers subject to the Act, which shall show in detail their receipts and expenditures and various other specified matters and "also contain such informa-

tion in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require"; to "prescribe the manner in which such reports shall be made and to require from such carriers specific answers to all questions upon which the Commission may need information"; and also to require any or all of said carriers, by general or special orders, to file periodical or special reports, under oath, "concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce"; the failure to file said annual reports, or any of such periodical or special report or to make specific answer to any such authorized question, within the time required, subjecting the carrier to a forfeiture of one hundred dollars for each day of default.

Section 20 (as amended by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 484, 593) further provides that: "The Commission may in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. * * * "The Commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records and memoranda of the movement of traffic, as well as the re-

ceipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers * * * in case of failure or refusal on the part of any such carrier * * * to keep such accounts, records and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners," such carrier shall forfeit five hundred dollars for each day of the continuance of such offense. "Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter or * * * falsify the record of any such account, record or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor," and shall be subject to a fine of from one thousand to five thousand dollars or imprisonment from one to three years, or both; "Pro-

vided" (as amended by the Act of February 23, 1909, c. 193), "that the Commission may at its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

It will be observed that these sections deal with several separate and distinct matters, namely, the right of the Commission, under Section 12, to obtain "information" from the carriers, and to compel, by subpoena, witnesses to testify and produce documentary evidence; its right, under Section 20, to require the carriers to file annual, periodical or special reports, concerning matters within the scope of the Commission's duties, and to require specific answers to questions, and, finally, under Section 20, its right to have direct access to the "accounts, records and memoranda" kept by the carriers and to inspect the same through its examiners. All of these provisions, however, except the last, relate either to information furnished to the Commission by the carriers, through reports or answers, or to information obtained by it through the process of subpoena; and only the last relates to its right of direct access to records in the possession of the carriers for the purpose of an independent examination. The present case involves only the extent of the last-mentioned right; and the crucial question is as to the true scope and meaning of the words "accounts, records and memoranda" as used in this clause of Section 20 of the Act.

The provisions of this section of the Act in reference to the "accounts, records and memoranda" to be kept by common carriers are to be construed in the light of the well-settled principles governing the construction of statutes in derogation of the common law and of a penal nature; and they are to be read not only in connection with the other provision of the Act, above mentioned, in reference to the obtaining of information by the Commission through other methods than direct examination, in which broad language is used in marked contrast to the limited phrase, "accounts, records and memoranda," but also, in such manner that, if reasonably possible, these words may be given the same meaning wherever used, and a harmonious and consistent construction given to the several provisions of the Act in reference thereto.

After careful consideration, I have reached the conclusion that the "accounts, records and memoranda" of common carriers to which the Commission is given the right of access and examination are those whose form it is, by the sentence immediately preceding, authorized to prescribe; and that the phrase "accounts, records and memoranda" as used in this section of the Act does not relate to corespondence or other original papers or documents in the possession of the carriers, constituting part of their business acts and transactions, but to the records of such acts and transactions, including the movements of traffic as well as accounts of receipts and expenditures, which the carriers are required to enter "on the books and in the manner" and forms which the Commission may prescribe, constituting book entries of their acts and

transactions, in the nature of a general system of accounting, which shall be at all times subject to inspection and examination by the Commission.

In Harriman v. United States (U. S.), *sup.* at p. 421, such "accounts, records and memoranda" are referred to, in general terms, as "accounts"; and in Interstate Commission v. Goodrich Transit Co., 224 U. S. 194, they are variously designated as "a system of accounting" provided in the orders of the Commission (p. 211) "accounts to be kept in a uniform way and to be open to the inspection of the Commission" (p. 211), "accounts" (p. 211) and as a "general form of accounting" (p. 212); and in Kansas City Railway v. United States, 231 U. S. 423, reference is made to the "declared object of standardizing railroad accounts" (p. 440) and to the purpose manifested by Congress "to standardize and render uniform the accounts of the different carriers both with respect to matters that enter into property and the improvements thereof on the one hand and the current operations of the companies on the other." (P. 442.) It further appears that all of the provisions in question in reference to the "accounts, records and memoranda" of common carriers, which were incorporated by the Act of 1906 as an amendment to the Interstate Commerce Act, are derived, in literal and exact terms, from the draft of a bill admitted to Congress by the Commission, in 1905, the passage of which it recommended; and that in recommending to Congress the adoption of this amendment the Commission entitled that portion of its report dealing with this matter "*Examination of Books of Ac-*

count," and under this heading said: "An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates or kindred wrongdoing." (Nineteenth Annual Report of Interstate Commerce Commission, 1905, at pp. 11, 177 and 182.)

I can not believe that Congress in adopting the amendment thus recommended for the purpose of giving the Commission authority "to prescribe the form in which books of accounts shall be kept by railways" and to examine "such books" at all times through expert accountants, contemplated that such amendment would give the Commission the right of free and unlimited access at all times, to the entire general correspondence of the railways, upon all subjects whatsoever, however remote from the purposes of the Act or foreign to the province of the Commission, and including, it is to be noted, letters sent to the carriers by their correspondents, as to which the Commission could obviously prescribe no form. There are in the Act, as thus amended, no words indicating this intention on the part of Congress, such as a general provision giving the Commission the right to inspect all correspondence of carriers subject to the

Act, or all their books, papers and documents, or other apt words of general and unrestricted import; and nothing, in short, that in my opinion, indicates or suggests such intention, I am therefore constrained to conclude that such right of examination of the general correspondence of the carriers is not conferred upon the Commission by Section 20 of this Act, although the inspection thereof may be obtained by the Commission under writ of subpoena in the instances and for the purposes coming within the provisions of Section 12 of the Act. (See Harriman v. United States (U. S.), *sup.* And while apparently the effect of the proviso incorporated in Section 20 of the Act of 1909 is to confer upon the Commission, by implication, the additional right to examine such "records, books, blanks, tickets, stubs or documents" of a carrier, relating to "operating, accounting, or financial" matters, as it may, by orders require to be preserved, this obviously does not confer upon the Commission any right to inspect a carrier's general correspondence which is neither alleged nor shown to contain any document of this character.

It therefore follows that, in the instant case, the defendant in refusing the examiner access to its general correspondence files, as demanded by him, neither failed to comply with, nor violated, any provision of the Interstate Commerce Act or of its amendments; and that hence the plaintiff is, all other considerations aside, not entitled under the Act, to the writ of mandamus sought.

Being of opinion that, for this reason, the plaintiff is not entitled to the issuance of a writ of mandamus to

compel the inspection of the defendant's correspondence, it is hence unnecessary to determine whether, if otherwise entitled, such writ should, in the instant case, be denied, in the exercise of the discretion vested in the court in the granting of a writ of this character, either upon the ground that the examination appears to be sought, in part at least, for an unauthorized purpose, that is, the investigation of many matters set forth in the Senate resolution, which, it is insisted, are entirely beyond the scope of the Commission's authority; or because of the broad and sweeping character of the demand made upon the defendant, overstepping, it is insisted, the limits of a reasonable search. See 26 Cyc. 147, 150; United States v. Louisville Railroad (U. S.) *sup.* at p. 494.

For the reasons stated, however, an order will be entered denying the plaintiff's motion for the issuance of the writ.

SANFORD, *Judge.*

September 4, 1914.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 499.

THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL, PLAINTIFF IN ERROR,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, DEFENDANT IN ERROR.

REPLY BRIEF FOR DEFENDANT IN ERROR.

HENRY L. STONE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
HELM BRUCE,
For Defendant in Error.

December 9, 1914.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

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THE UNITED STATES OF AMERICA, BY JAMES C. McREYNOLDS, ATTORNEY GENERAL, PLAINTIFF IN ERROR,

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REPLY BRIEF FOR DEFENDANT IN ERROR.

In a brief lately filed by counsel for the Interstate Commerce Commission much is said about the "visitatorial" powers exercised over corporations, and this term is applied to the power under which it is sought to justify the unlimited demand of the Interstate Commerce Commission for access to all books, correspondence, and other character of papers belonging to the defendant corporation.

We submit that not much advance is made toward a clear understanding of the nature and extent of the power which Congress or the Commission, under authority of Congress, has in the matter of the examination of such papers by calling the power "visitatorial." This is a common-law term

applied to the power which a "visitor" of a corporation exercised, and, as we understand the nature of the power of a visitor, or the visitatorial power, it was a judicial power, the power to determine controversies over the appointment or removal of officers, or charges of mismanagement, or of departure from the purposes fixed by the charter of the corporation, or the rules laid down for its government, and matters of similar nature.

The most oft-quoted opinion to be found in the books on the subject of visitatorial powers is that of Lord Holt in the celebrated case of Phillips *vs.* Bury, 2 Term Rep., 346, of which this court, speaking by Mr. Justice Story, in the Dartmouth College case, said: "The nature and extent of this visitatorial power has been expounded with admirable fullness and accuracy by Lord Holt in one of his most celebrated judgments." And in this case Lord Holt expressly states that a visitation is a judicial proceeding, and he treats the visitor as a judge and his determination as a judgment. That was a case in which the Bishop of Ely had removed Dr. Bury from the office of rector and the question was as to the effect of that act. The act of removal had been done in July, but there had been a previous proceeding in June, and, as the number of visitations which the Bishop could make was limited, it became important to consider the nature of the action taken in June, and, on that subject, Lord Holt said:

> "Then the next thing to be considered is whether that which was done on the 16th of June was visitation. * * * It would be very absurd to construe his coming there to visit to be a visitation, *which imports a judicial proceeding*" (page 349). (Our italics.)

Then again, in speaking of the duties of a visitor, his Lordship said:

> "A visitor being then of necessity created by the law, every hospital is visitable, either by the patron,

> if a law hospital, or by the ordinary, if spiritual. What is the visitor to do? He is to *judge* according to the statutes and rules of the college. He may expel and he may deprive" (page 353). (Our italics.)

And again, on the same subject, he says:

> "I thought we had been come to some certainty at law since that case of Appleford, that where there is a visitation and he hath power to proceed to deprivation, this court ought to give credit to the justice of his proceedings, *as much as to those of any judge;* and I remember that my Lord Hale took it for clear law, that such a sentence was as strong as a judgment of an assize to bind the party deprived. *He is made a judge,* and particularly designed by the founder. But he hath his authority from the law, and he is to *judge by the statutes* (page 356). (Our italics.)

Again this language is used in the opinion:

> "And as he" (the founder) "is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behavior of the members that partake of the charity; for it is fit the members that are endowed and that have the charity bestowed upon them should not be left to themselves (for divisions and contests will arise among them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them" (page 352).

By this language last quoted we understand Lord Holt to mean that the visitor is to determine all divisions and contests among the members of the corporation, or those for whose benefit it is created, and all questions of departure from the purposes or rules of the corporation, very much as a court of equity supervises an ordinary trust, and that in the language heretofore quoted from the previous part of the opinion "a visitation * * * imports a judicial proceeding."

That such is the character of the visitatorial power is also clearly shown by the case of The King *vs.* The Bishop of Ely, 2 T. R., 290. There it appeared that the Bishop of Ely was authorized to appoint a master of Peterhouse College, Cambridge, from two persons to be nominated and presented to him by the fellows of the college. He was also visitor of the college. The fellows did nominate two men and presented their names to the Bishop, who, however, appointed a third man. Thereupon, a rule was issued against the Bishop in the court of King's Bench to show cause why a mandamus should not issue commanding him to appoint one of the two nominees of the fellows. It was insisted in opposition to the rule that his appointment was the exercise of his visitatorial power, and, therefore, could not be questioned by the court. But the three judges of King's Bench, in separate opinions, all held that his act of appointment was not by virtue of his visitatorial power, and that he, himself, recognized this by the manner of his proceeding, because he did not give notice or a hearing on the subject. Mr. Justice Buller, in his opinion, said:

> "That the Bishop of Ely is the visitor of Peterhouse is clear, and it is equally clear that this court has no jurisdiction to enquire into acts done by a visitor as such. * * * The first point to be considered in this case is, whether the act done by the Bishop and which is the subject of the present complaint were or were not a visitatorial act. Secondly, if it were not, whether it can now be enquired into and redressed by him as visitor, supposing it to be wrong? As to the first point, I think there is not the smallest pretense or foundation for saying that the Bishop appointed Mr. Longmire in his capacity of visitor. * * * His proceedings, therefore, have not even the show of a visitation; for whenever that is intended, the parties whose conduct or whose rights are objected to, should be heard, or, at least, convened before him, and have an opportunity of being heard; but, in the present instance, this ceremony was totally omitted" (pp. 337, 338).

In Tudor on Charities and Mortmain, the author has quite an extended discussion of the subject of "visitation," as applicable to eleemosynary corporations, from all of which it is clear that the power of visitation is of a judicial nature. He says: "The visitatorial tribunal, as has been already indicated, is a domestic forum, it is the *court of the founder*" (p. 68). He has one paragraph in which he says: "The ordinary duties of a general visitor comprise the election and amotion of corporators such as the master and fellows of a college," etc.; but when the authorities cited under this paragraph are read, it will be found that they all involve *controversies* over elections (involving usually questions of eligibility), or amotions, or charges of mismanagement, or of departure from the purposes of the charity, matters which either had been taken up before the visitor, or which the courts held ought to have been taken up before him; such as Attorney General *vs.* Talbot, 3 Atk., 662, involving the election to a fellowship by the masters and fellows of Clair-Hall, it being contended by the complainant that the person elected was ineligible, and wherein the Lord Chancellor determined that this was a question which should have been submitted to the visitor of the college; or again, the case of Phillips *vs.* Bury, 2 Tr., 346, heretofore mentioned; or again, Dr. Bentley's case (Bentley *vs.* Bishop of Ely, 2 Brown's Cases in Parliament, 2d ed., p. 220), where the Bishop heard charges against Dr. Bentley and expelled him; or again the case of *Ex parte* Berkhampstead Free School, 2 Vesey and Beam, 134, involving a complaint of maladministration.

It is commonly said that only ecclesiastical and eleemosynary corporations are subject to visitation, and that civil lay corporations are not thus subject. Blackstone, however, explains that statement as follows:

> "The King being thus construed by law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction: *which is the court of King's Bench;* where, and where only, all misbehaviors of this kind of corporations

> are enquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers when they say that these civil corporations are liable to no visitation; that is, that the law, having by immemorial usage appointed them to be visited and inspected by the King, their founder, in *His Majesty's Court of King's Bench*, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority" (1 Blackstone's Com., star page 481).

So in Bacon's Abridgment it is said:

> "Spiritual corporations are visited in ecclesiastical matters by the ordinary; ecclesiastical corporations are subject to the visitation of the founder, his heirs or assigns, and other civil corporations to that of the King *in his court of King's Bench*" (2 Bacon's Abridgment (Bouvier's edition), page 477).

And so Chancellor Kent, in his Commentaries, says:

> "The visitation of civil corporations is by the government itself *through the medium of the courts of justice.*"

In MacKenzie *vs.* Trustee of Presbytery of Jersey City, 67 N. J. Eq., 652, the Court of Errors and Appeals of New Jersey, said:

> "Corporations only are visited, and these within three classes—ecclesiastical, civil, and eleemosynary. * * * Civil corporations were such as were created for a variety of temporal purposes. * * * Trading companies, for the advancements of manufacture and commerce * * * these were subject to the jurisdiction of the King's Bench; that is to say, to the visitation of the Crown, exercisable in that court" (pages 678, 679).

These authorities seem to show that the function of the visitor at common law was always considered a judicial function, and that the examinations made of the corporation by

the visitor were in the exercise of this judicial function, or, in other words, that the visitatorial power was a judicial power, exercised either, in the case of an ecclesiastical or eleemosynary corporation, by some natural person, holding the office of a visitor, or, in the case of a lay corporation, by the court of King's Bench, or later, it seems, by the Lord Chancellor, acting for the King.

Moreover, another thing with reference to the "visitor," as known at common law, is certain, to wit: *That he was the founder of the corporation*, or his heir or appointee. In case of an eleemosynary corporation, the founder was generally a private person, and, in the case of a lay corporation, it was the King. There was no such thing at common law as the visitation of a corporation by one other than the *founder*, or his heir or appointee, or, in case of the King, one of his courts.

Furthermore, the jurisdiction of the visitor of a corporation was confined to the internal affairs of the corporation, such as the election or removal of officers, or questions of violation of or departure from the purposes of the corporation. *No charge of violation by the corporation of the general law of the land could ever be tried by any visitor, or in the exercise of any visitatorial power.* Such matters could only be tried in the court of King's Bench, exercising other than visitatorial powers. On this subject Bacon says:

> "Where the public laws of the land are disobeyed, the court of King's Bench will interfere, notwithstanding there be a visitor; for his province is confined to the private statutes and domestic regulations" (2 Bacon's Abridgment, 480; Rex *vs.* St. John's College, 4 Mod., 233).

And this court, in comparatively late years, has had occasion to consider the general nature of visitatorial powers in the case of Guthrie *vs.* Harkness, 199 U. S., 148, in which a stockholder of a national bank was insisting upon the right to examine the list of the stockholders of the bank

and in which the bank insisted that this was prohibited by section 5241 of U. S. Revised Statutes, which, referring to national banks, provides that "no association shall be subject to visitorial powers other than such as are authorized by this title, or are vested in the courts of justice." This court held that the right of a stockholder to examine the books of a corporation was in no sense the exercise of "visitorial power," referring to certain of the authorities which we have already mentioned. And, in the course of the opinion, the court said:

> "The right of visitation being a public right, existing in the State for the purpose of examining into the conduct of the corporation *with a view to keeping it within its legal powers*, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and authorizing the appointment of a receiver to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no State law or enactment should undertake to exercise the right of visitation over a national corporation, except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.
>
> "That the statute did not intend in withholding visitorial power to take away the right to proceed in courts of justice to enforce such recognized rights, as are here involved, is evident from the language used. If the right to compel the *inspection of books* was a well recognized common law remedy, as we have no doubt it was, it would belong to that class 'vested in courts of justice,' which are expressly excepted from the inhibition of the statute" (page 159). (Our italics.)

The court here seems to recognize two propositions: (1) that visitorial power is a power exercised by the creator of a corporation, "with a view to keeping it within its legal

powers," that being peculiarly the province of the creater or founder of a corporation, and (2) that "the right to compel the inspection of books," if included in visitorial powers, as the terms are used in the statute, would belong to that class *vested in courts of justice*.

Our purpose in referring to the authorities on the subject of "visitors" and "visitation" and "visitatorial powers," or, as the term is written in these days, "visitorial" powers, is to show that in no proper sense, according to the meaning of those terms, as they were known at common law, can the power claimed by the Interstate Commerce Commission, under the act of Congress, to personally examine the books of the Louisville & Nashville Railroad Company, a corporation created by the State of Kentucky, be called a "visitatorial" power. It is a power sought to be exercised, (1) not in the performance of any judicial function; (2) not by the creator or founder of the corporation, and, (3) not for the purpose of determining the validity or regularity of any internal proceeding, or to determine whether or not it is keeping within the limitations of its charter; but it is a proceeding wholly disconnected from the exercise of any judicial power, and is a proceeding by a State other than the State which created the corporation, and is a search for evidence of the violation, not of some internal regulation or charter limitation, but of the general law of the United States.

Plainly, therefore, this power here claimed is not the exercise of "visitatorial" power, as the meaning of that term has become fixed in the law, and nothing is gained by calling it such, and whatever power the United States has in the matter is simply that power which every State has to see that its laws are obeyed by those who are within its borders, a power which is exercised not only with reference to corporations, but with reference to natural persons; a power exercised, it is true, in different ways to meet differing conditions, but always and necessarily subject to the limitations of the Constitution.

And this leads us to refer briefly to a statement near the conclusion of the brief of the Solicitor General, in which, referring to the asserted powers of the Interstate Commerce Commission to enter any office of a railroad company and to examine anything it pleases for any purposes it pleases, and referring to the defendant's insistence that this is a violation of the Fourth Amendment, he says:

> "Having the power to regulate, Congress must also be held to have the power to determine what means are appropriate for carrying into effect its control" (page 43).

As we understand the proposition here advanced, reading it in the connection in which we find it in the brief, it is that because Congress has the power to regulate interstate commerce, it has the power, unfettered and unlimited by the provisions of the Fourth Amendment to the Constitution, to determine what means are appropriate for carrying into effect the control which Congress has over interstate commerce.

This is, in effect, an assertion that because Congress is by the Constitution given power to enact laws upon a certain subject, it is, therefore, freed from the limitations imposed upon its power by that very Constitution. In this connection we call attention to the fact that Congress has power to regulate the revenues of the Government and to pass laws imposing taxes, both in the form of tariffs and internal-revenue taxes, and to make regulations concerning the same. It also has power to pass laws regulating post-offices and post-roads. All of which powers it has exercised in great detail. Are we to understand, then, that in the exercise of these powers, which are just as clear as the power to regulate commerce, Congress is not subject to the limitations of the Constitution? Of course, this cannot be and is not true. In fact, in the very opinion to which the Solicitor General refers in connection with the statement heretofore quoted from his brief, to wit, Flint *vs.* Stone-

Tracy Co., 220 U. S., 107, 176, quotation is made from McCulloch *vs.* Maryland, 4 Wheat., 421, in which the court, by Chief Justice Marshall, said:

> "Let the end be legitimate, let it be within the language of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, and *which are not prohibited, but are exercised with the letter and spirit of the Constitution* are constitutional" (page 176). (Our italics.)

And we may remind the court that in the great case of Boyd *vs.* United States, 116 U. S., 616, the order for the production of papers made by the district court in that case, and which this court held called for unreasonable search and seizure of the defendant's papers, was an order made strictly in accordance with a provision of an act of Congress, which act this court held to be void, it being an act concerning the enforcement of the tariff laws.

And in the late case of Weeks *vs.* United States, 232 U. S., 383, in an opinion delivered by the same member of the court, Mr. Justice Day, who delivered the opinion in Flint *vs.* Stone-Tracy Co., *supra*, the court, in holding that the Fourth Amendment of the Constitution had been violated by a search and seizure of Weeks' papers by a United States marshal in an endeavor to punish a violation of the laws against lottery, quoted with approval the language of the court in Bram *vs.* United States, 168 U. S., 532, with reference to the Fourth and Fifth Amendments, as follows:

> "It was in that case" (the Boyd case) "demonstrated that both of these amendments contemplate perpetuating, in their full efficiency, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country, only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, *free from the possibilities of future legislative change*" (page 391). (Our italics.)

And again in the same case the court said:

> "The effect of the Fourth Amendment is to put the courts of the United States *and Federal officials*, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority and to forever secure the people their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, *and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of law*" (page 31.) (Our italics.)

And while the court thus strongly states the controlling force of this provision over all persons entrusted with the enforcement of Federal laws, it likewise states in strong terms the history, meaning and effect of the Fourth Amendment. After referring to the practices which had prevalid in England of issuing "general warrants" for the search of premises and the practice in the American colonies of issuing what were called "writs of assurance," the court says:

> "Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded *by any general authority* to search and seize his books and papers" (page 390). (Our italics.)

The shield of this "fundamental law" protects corporations, as this court has held, and, as said before, it is impossible to conceive of a more *"general authority* to search and seize books and papers" than is claimed, and sought to be enforced by mandamus, in the case at bar.

If it be claimed—though we do not know that it is—that there is here no attempt to "seize" the books and papers, we say *there is*, just as much so, certainly, as in Boyd *vs.* United States, 116 U. S., 616, where the statute, under which

the order for the production of the papers was issued, expressly provided that *the owner of the papers should remain in custody of them,* except pending this examination, and furthermore that he should have the right to be present when they were being examined (p. 620). Of this procedure Mr. Justice Bradley eloquently said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*" (p. 635).

And in conclusion it may be remarked that when an interstate commerce examiner, over the objection of the owner, takes into his possession, from its accustomed place, a file of correspondence, keeps it as long as he pleases, reads, copies it, or makes extracts from it to be sent to the Commission, this is both in letter and in spirit a "seizure." The Constitution says nothing about how long the possession resulting from the seizure may or may not last. It says the seizure shall not be made at all.

Counsel for the Commission refers to Hammond Packing Company *vs.* Arkansas, 212 U. S., 322, as bearing on this question of unreasonable search and seizure, that being the case where the court struck from the files the answer of defendant for failure to obey an order for the production of books and witnesses. But the Supreme Court of Arkansas, from which the case came to this court, expressly rested its

approbation of this course on the fact that the defendant did not even produce, or attempt to produce, *the witnesses*, and for that reason declined to pass, because unnecessary, on the validity of the order as to the books and papers, and that was the ruling which was before this court for review (p. 340).

Counsel also refers to Consolidated Rendering Company *vs.* Vermont, 207 U. S., 541. But in that case the order was limited to the production of such books and papers as showed the dealings of *certain named parties* between two *specified dates*, viz., January 1, 1904, and October, 1906 (p. 554). The court simply held that that order was not so general as to be an unreasonable search under the ruling in Hale *vs.* Henkel. That case, therefore, is manifestly no authority for the proceeding in the case at bar.

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